(24,147)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 121.

THE NORTHWESTERN LAUNDRY AND T. R. HAZARD, APPELLANTS,

vs.

THE CITY OF DES MOINES, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1915.

a Pleas and Proceedings before Honorable Smith McPherson, Judge of the District Court of the United States for the Southern District of Iowa, in a certain cause lately pending in the Central Division of the said Court wherein The Northwestern Laundry and T. R. Hazard are Appellants and the City of Des Moines, Iowa, et al, are Appellees, No. 15-A. Equity.

Appearances:

O. M. Brockett, Des Moines, Iowa, Attorney for Appellant.
R. O. Brennan, Des Moines, Iowa; H. W. Byers, Des Moines, Iowa; Eskil C. Carlson, Des Moines, Iowa, Attorneys for Appellees.
Wm. C. McArthur, Clerk, P. O. Des Moines, Iowa.

1 Filed March 16th, 1914. W. C. McArthur, Clerk.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Des Moines, Iowa; James R. Hanna, Mayor; W. A. Needham, Zell G. Roe, J. I. Myerly, F. T. Van Liew, Commissioners; H. W. Byers, Corporation Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector, and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and George France, Members Smoke Abatement Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within Thirty (30) days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States for the Southern District of Iowa, Central Division, and filed in the clerk's office of said court on the 7th day of March, 1914; in a cause wherein T. R. Hazard and the Northwestern Laundry are appellants and you are appellees, to show cause, if any why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Smith McPherson, Judge of the District Court of the United States, for the Southern District of Iowa, at Des Moines, Iowa, March 7th, 1914.

SMITH McPHERSON, *Judge.*

Service of a copy of the within citation is hereby admitted this 16th day of March, A. D. 1914.

H. W. BYERS,
R. O. BRENNAN &
ESKIL CARLSON,
Attorneys for Appellees.

2 Be it remembered that on the 7th day of October A. D. 1913 a Bill of Complaint was filed by the Northwestern Laundry and T. R. Hazard, Complainants, against the City of Des Moines, Iowa, et al., Defendants, in cause No. 15-A-Equity, Central Division, which said Bill of Complaint is in words and figures as follows to-wit:

3 In the District Court of the United States for the Southern District of Iowa, Central Division.

In Equity. 15-A, Eq.

THE NORTHWESTERN LAUNDRY and T. R. HAZARD, Complainants,

vs.

CITY OF DES MOINES, IOWA; JAMES R. HANNA, Mayor; W. A. NEEDHAM, Commissioner; Zell G. Roe, Commissioner; F. T. Van Liew, Commissioner; J. I. Myerly, Commissioner; W. H. Byers, Commerce Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Ass't City Solicitor; Harry McNutt, Smoke Inspector; and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and Geo. France, Members Smoke Abatement Commission, Defendants.

Bill of Complaint.

To the Honorable Judges of the District Court of the United States for the Southern District of Iowa:

The Northwestern Laundry and T. R. Hazard bring their joint bill of complaint against the City of Des Moines, Iowa; James R. Hanna, Mayor; W. A. Needham, Zell G. Roe, F. T. Van Liew, and J. I. Myerly, Commissioners; W. H. Byers, Commerce Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector; and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker and George France, Members of the Smoke Abatement Committee, and thereupon your orators complain and allege:

I.

Your orator, the Northwestern Laundry is a corporation organized under the laws of the State of Iowa for pecuniary profit, with its principal place of business in the City of Des Moines, Iowa,
4 and a citizen of the State of Iowa, and engaged in the general laundry business. Your orator T. R. Hazard is a citizen of the State of Iowa, and is president of said Northwestern Laundry, and the owner of a large amount of its capital stock.

II.

The defendant, the City of Des Moines, is a municipal corporation and city of the first class, organized under the laws of the State of Iowa, and located in said State. The other defendants are

officers respectively of said city, as follows: James R. Hanna, Mayor; W. A. Needham, Zell G. Roe, F. T. Van Liew, and J. I. Myerly, Commissioners; W. H. Byers, Commerce Counsel, R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector; and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker and George France, members of the Smoke Abatement Commission; that said mayor and Commissioners or Councilmen constitute the legislative and executive body which exercise for said city its general corporate powers; that said corporation counsel, city solicitor, and assistant city solicitor constitute its legal department, and are charged with the duty of assisting, as such, in the enforcement of its ordinances, and in prosecuting and defending its rights in all proceedings in the courts; that the defendant Harry McNutt is Smoke Inspector for said city, and the defendants Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker and George France, constitute the smoke abatement commission of said city; the duties and authority of which inspector and commission are attempted to be defined by the ordinance of said city hereinafter complained of, and that said defendants are each and all residents and citizens of the state of Iowa, and of the Central Division of the Southern District thereof.

III.

The complainant Northwestern Laundry has for several years last past owned and operated, and does now own and operate, a large steam laundry in said City of Des Moines, employing therein a large amount of expensive machinery, and equipment requiring for its operation a large amount of steam power, which is produced by means of steam boilers and engines, requiring for the purpose a large furnace and smoke stack or chimney, and the constant consumption for necessary heat and power production, of a large amount of the local bituminous coal mined and produced in and about the City of Des Moines. Such furnace and smoke stack is of standard approved construction, but not equipped with any of the modern patented so-called smoke consuming devices, having instead thereof and for the same purpose, the steam jet device. The Complainant T. R. Hazard, as president of said Northwestern Laundry, is and long has been engaged in the active personal management thereof, and as a large stock-holder in the same, is pecuniarily interested therein.

IV.

That many other persons, firms and corporations who are residents and citizens of said City of Des Moines, and many others who are non-residents of said City of Des Moines, and State of Iowa, are similarly interested and engaged in the ownership, management and operation of industries, plants, and enterprises in said City of Des Moines, requiring therefor similar plants and devices for heat and power production, and the consumption of large quantities of said bituminous coal for such purpose; such persons, firms and corporations being too numerous to be made parties com-

plainant herein; and these complainants say that they bring this their bill of complaint on behalf of all such persons, firms and corporations, as well as in their own behalf.

V.

That the coal used by these complainants, and generally used by the other persons, firms and corporations on whose behalf also these complainants bring this their bill of complaint, for the purposes aforesaid, is produced in and about the City of Des Moines in great quantities; the production thereof constituting one
6 of the chief industries of the vicinity of said City of Des Moines, and of the State of Iowa. That said coal is well adapted to such use and is much more economical therefor than any other known fuel and such heat and power can be produced by such use thereof with much less expense than by any other known device.

VI.

That at and prior to the happening of the matters and things hereinafter complained of, it has not been, nor has it since been nor is it now possible, by the use of the ordinary, usual, and common method of construction of furnaces, smoke stacks and chimneys, to make such use of said coal without permitting the escape from such smoke stacks and chimneys of the emission of smoke of a duration of density prohibited by the ordinance of said City of Des Moines, hereinafter complained of; notwithstanding that in many cases they do not emit such quantities as to constitute nuisances in fact. That if it is possible to alter, remodel, or rebuild and equip such furnaces, smoke stacks and chimneys with devices and modes of construction which will prevent the same, that the same cannot be done without very great, and in many instances prohibitive, expense.

VII.

Complainants say, however, that it is practical to so use said coal for said purposes in the furnace of complainant Northwestern Laundry, and of others operated by and for those on whose behalf this bill is brought, without the remodelling and special equipment sought by defendants to be required by the enforcement of said ordinance, and in such wise as will not thereby create any nuisances in fact; and that in many of the instances in which such prosecutions have been brought and fines assessed, and in which others are now threatened, no nuisances have been or will be in fact maintained, although convictions under said ordinance have been and will be had.

VIII.

That the Thirty-fourth General Assembly of the State of Iowa enacted a statute known as Chapter 37 of the laws of said
7 session, which, including its title, reads as follows:

"Emission of Smoke in Certain Cities."

H. F. 556.

"An Act declaring the emission of smoke within the corporate limits of certain cities to be a public nuisance, and conferring upon such cities additional powers for the abatement of such nuisances. (Additional to chapter four (4) of title five (V) of the code, relating to general powers of cities and towns.)"

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 1. Declared a nuisance. The emission of dence smoke within the corporate limits of any of the cities of this state now or hereafter having a population of sixty-five thousand (65,000) inhabitants or over, including cities acting under the commission plan of government is hereby declared to be a public nuisance.

SECTION 2. Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance.

Approved April 15, 1911."

That prior to the enactment of the statute in this paragraph recited, it was the law of the state of Iowa that said defendant City of Des Moines, and its said City Council, had no power to enact any ordinance defining what should be held to constitute a nuisance, and no power to prescribe any punishment for the creation or maintenance of a nuisance, and had no power to authorize or maintain actions in the courts in the name of such city for the abatement of any nuisances.

IX.

That thereafter, and on or about the 6th day of September, 1911, under the pretended authority of said Chapter 37 of the Laws of the said Thirty-fourth General Assembly of the State of Iowa, the defendant City of Des Moines by its said city council, undertook to pass and adopt its ordinance No. 1870, known as the "Smoke Ordinance", a copy of which is hereto attached, marked Exhibit A, and made a part hereof.

X.

That thereafter the Thirty-fifth General Assembly of the
8 State of Iowa enacted what is known as Chapter 49 of the laws of said session, which, including the title, reads as follows:

"Chapter 49.

Emission of Smoke in Certain Cities.

Sub. for S. F. 103.

An Act declaring the emission of smoke within the corporate limits of certain cities, including cities acting under special charter, to be a public nuisance, and conferring upon such cities additional powers for the abatement of such nuisances and repealing chapter thirty-seven of the laws of the thirty-fourth general assembly. (Additional to chapter four (4) of title five (V) of the code, relating to general powers of cities and towns.

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 1. Declared a Nuisance. The emission of dense smoke within the corporate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter now or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance.

SECTION 2. Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment, or by action in the district court of the county in which such city is located, or by both; such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection, and the abatement and prevention of the smoke nuisance.

SECTION 3. Repeal. That chapter thirty seven (37) of the laws of the Thirty-fourth general assembly be and the same is hereby repealed.

Approved March 20, A. D. 1913."

XI.

That since the adoption of said pretended Smoke Ordinance, and both before and since the enactment of said Chapter 49 of the Laws of the 35th G. A., the defendants have caused numerous informations to be filed, prosecutions to be conducted and fines to be assessed in the police court of the said city against the complainant T. R. Hazard, and many of the other persons, firms and corporations on whose behalf this complaint is brought, and are continuing to do so from time to time and are now threatening to institute innumerable proceedings of such character against this complainant and against said other persons, firms and corporations for violations and pretended violations of the several provisions of said smoke ordinance.

9 XII.

The aggregate amount involved in this controversy exceeds the sum of Three Thousand Dollars exclusive of interest and costs, and

this controversy involves the construction of certain provisions of the Constitution of the United States, to-wit:

First. Those prohibiting the taking of complainant's property without due process of law.

Second. Those guaranteeing to complainant equal protection of the law.

XIII.

The said Smoke Ordinance of the City of Des Moines is in contravention of and violates the Fourteenth Amendment of the constitution of the United States, and is void in that it deprives complainants of their property without due process of law, and deprives them of the equal protection of the law.

XIV.

Said ordinance is void for the following further specific reasons:

1. It requires a standard of efficiency in smoke consumption and prevention which will necessarily require the remodelling and reconstruction of all or practically all furnaces and their equipment which were in existence at the time of its adoption.

2. It prohibits the remodelling or rebuilding of the same and the substitution of any equipment without the procurement of the permit or licenses therein prescribed.

3. It prohibits the construction and equipment of all new furnaces and smoke stacks without such permit or license.

4. It vests final absolute and unregulated discretion in the smoke inspector, in the first instance, and in said smoke abatement commission in the last instance, to grant or withhold such permit or license, and attempts to make each of the acts for which such permit or license is required when done without the same, a crime, and provides for fine and imprisonment as a punishment therefor, and makes it impossible to operate existing plants not so remodelled without violating such ordinance, thus placing the right of the complainants and those on whose behalf they bring this bill, to own and operate such furnaces wholly at the unregulated, arbitrary and absolute discretion and pleasure of said smoke inspector and smoke abatement commission, thus taking their property without due process of the law, and denying them the equal protection of the law.

5. It is in excess of the authority delegated by the legislature to the city.

6. It attempts to define the offense of a public nuisance as committed by the emission of dense smoke, whereas the legislature has attempted to enact such definition by section one of Chapter 37 of the laws of the 34th General Assembly and of said Chap. 49 of the laws of the 35th G. A., and has nowhere attempted to delegate authority to the City of Des Moines to enact by ordinance what shall be the definition of such offense, nor to declare that the issuance of dense smoke under any circumstances shall constitute an offense against the ordinances of such city.

7. Said ordinance is void because grossly unreasonable and tyrannical.

8. It is in excess of the authority delegated, and unreasonable because it does not operate uniformly throughout the whole city; because the want of uniformity provided for therein is not limited to natural and just exceptions and qualifications; because it provides for arbitrary tests to determine the prohibit degree of density, and the duration thereof, and to place within th power of the smoke inspector to furnish as of his own knowledge, conclusive and unrebuttable proof in support of charges of violation thereof, and because it attempts to provide for unlimited numbers of successive fines constituting singly and in the aggregate excessive punishment, and without adequate remedy, and attempts to deprive the court of power to determine whether or not the nuisance has in fact been committed or maintained.

11 9. Said ordinance is further void because the only statute under the authority of which it can be claimed to have been enacted is unconstitutional. Section One of Chapter Thirty-seven of the laws of the 34th General Assembly is an enactment by the General Assembly of the State of Iowa that the emission of dense smoke within the corporate limits of the cities of this state, now or hereafter having a population of sixty-five thousand inhabitants or over, including cities acting under the commission plan of government, is thereby declared to be a public nuisance. The same is true of Sec. 1, of Chap. 49 of the laws of the 35th G. A. and cities therein named. Neither said sections nor any other statute of the State of Iowa, attempts to confer any authority upon any city in the State of Iowa to pass any ordinance declaring any act or thing to be a public nuisance, or to define or determine the condition or circumstances under which any act or thing prohibited by the laws of the State of Iowa as a nuisance shall constitute such an offense. After having declared, as a matter of state law that the emission of dense smoke within certain cities therein defined shall constitute a public nuisance, Section Two of said Chapter 37 and of said Chapter 49 attempts to delegate to such cities the power to prescribe the punishment for such offense, thereby attempting to give to such cities the power each to prescribe a different penalty from that of every other city therein designated, thereby indirectly attempting to do what it could not do directly, namely, to authorize different cities of the state to provide different punishments for the same offense against the laws of the state of Iowa.

10. Said statute under the authority of which said ordinance has been passed is void because it attempts to exercise the legislative power of the state government as to the general subject of nuisances committed by the emission of dense smoke, and then attempts to delegate to certain cities therein named the state's legislative power to enact for the state what the legislature

12 had already enacted should be an offense against the laws of the state.

11. The statute under the authority of which said ordinance is enacted, is unconstitutional, because it attempts to authorize legis-

lation that shall not be uniform and equal in its operation and application to all persons upon the same terms and conditions.

12. The statute under the authority of which said ordinance was enacted is unconstitutional and void because it is class legislation. It is not uniform in its operation because it was designed to and does apply only to the City of Des Moines, and because there is no natural or just reason for classifying cities of sixty-five thousand or over, in which the emission of dense smoke shall be prohibited and punished as a nuisance, whereas the same offense may be committed and the same injury therefrom inflicted in all other cities in the state with impunity.

13. Said ordinance is further void because the legislative power assumes to have been delegated to the City of Des Moines by Section 2 of said Chapter 37 of the Laws of the 34th G. A. of the State of Iowa, is a non-delegable legislative power vested solely and exclusively in the legislature by the constitution of the state.

14. Said ordinance, or the portion thereof prescribing punishment for its violation is further void because the second section of said act of the 34th G. A. is unconstitutional and void for the further reason that the subject matter thereof which attempts to authorize provision for punishment by ordinance is not sufficiently expressed in the title of the act, and to such extent is beyond the subject matter expressed in the title.

15. Said ordinance is further void, and the courts are without jurisdiction to enforce any of the provisions thereof or to adjudge anything by authority thereof, because the act of the 34th G. A. upon which alone it depended for its authority was repealed by Chapter 49 of the laws of the 35th G. A.

16. If any part of said act of the 34th G. A. of Iowa upon which the validity of said ordinance shall be found to depend shall be held to have been re-enacted or not repealed by said chapter 49 of the laws of the 35th G. A., then it is void because said latter statute is void for all the reasons hereinbefore shown as to the act of the 34th G. A., and because the same and both of said acts taken together, show that the classifications therein of cities to which they apply are arbitrary, and based upon no natural or just ground, and constitute special and class legislation prohibited by the constitutions of the State of Iowa, and of the United States.

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17. All of the objections herein urged against the validity of Chapter 37 of the Acts of the 34th G. A. apply to Chapter 49 of the acts of the 35th G. A.

XV.

That under various provisions of the laws of the State of Iowa, and of the ordinances of the City of Des Moines, and particularly of said so-called Smoke Ordinance, the several defendants herein named, assume to have the authority and to be charged with the duty of co-operating as such officers in the enforcement of the several provisions of said Smoke Ordinance, and to that end they have brought and prosecuted and threaten to continue to bring

and prosecute a multiplicity of proceedings for the enforcement of the criminal provisions of said ordinance, and are threatening to bring a multiplicity of actions to enjoin and abate the use of furnaces and smoke stacks operated by these complainants and others on whose behalf they bring this bill, for alleged violations of said ordinance, and will institute a multiplicity of such proceedings and will greatly harrass and annoy complainants and said other persons for whom this bill is brought to enforce said void ordinance; That the complainants and those for whom they bring this bill, have no plain, speedy and adequate remedy at law and will, unless the defendants are restrained from enforcing and from attempting to enforce the said void ordinance by the means aforesaid, suffer irreparable injury and damage.

14 XVI.

And for as much as your orators and those for whom they bring this bill have no adequate relief except in this court, and to the end that the defendants may, if they can, show why these complainants and those for whom they bring this bill, should not have the relief herein sought, that defendants answer this, your orators' bill according to the course of practice of this court, but not under oath, answer under oath being hereby expressly waived, and that it be declared by the decree of your honors that the provisions of said so-called Smoke Ordinance of the City of Des Moines, and of said Chapter 37 of the acts of the 34th G. A. and of Chapter 49 of the acts of the 35th G. A. of Iowa, are each in violation of the Constitutions of the United States and of the State of Iowa, and that said ordinance be declared void for the further reasons hereinbefore stated, and that such facts be declared for such further reasons as may by your honors be found to exist; That said so-called Smoke Ordinance be decreed void and of no effect, and that these defendants and each of them be enjoined and restrained, as follows:

That they and each of them and their successors in office be temporarily and permanently restrained and enjoined from any attempt to cause to be instituted or prosecuted any judicial proceedings whatever, provided for in said ordinance, or to procure to be rendered any judgment of any character whatever for the violation of any of the provisions thereof, and from attempting in any manner whatsoever to enforce any of the provisions of the same, or to claim any right, power or authority whatever by reason thereof;

That said defendants be temporarily and permanently restrained and enjoined from taking or causing to be taken, any action, steps, or proceedings against your orators or any of those for whom they bring this bill, for failing or refusing to comply with the said pretended Smoke Ordinance.

XVII.

15 May it please your honors to grant unto your orators and all of that class of persons for whom they bring this

bill, a writ of injunction issuing out of this honorable court, and under the seal thereof directed to said defendants and each of them, and their successors in office, temporarily and permanently enjoining them and each of them and their successors in office, as hereinbefore prayed.

XVIII.

That your orators have and recover judgment for the costs that have been expended; that they, and all that class of persons for whom they bring this their bill, have such other and further relief as the circumstances of this case require, and is conformable with the principles of equity and good conscience; that a writ of subpœna of the United States of America issue, directed to the defendants and each of them, commanding each of them by a day therein named, to appear and answer under this bill of complaint, and to abide and conform to such orders and decrees in the premises as to the court shall seem meet, and as is required by the principles of equity and good conscience.

(Signed) O. M. BROCKETT,
Attorney for Complainants.

UNITED STATES OF AMERICA,
State of Iowa, Polk County, ss:

I, O. M. Brockett, being duly sworn depose and say that I am the attorney for the Complainants in the foregoing bill of complaint; that I have read the said bill, and know the contents thereof, and that the matters and things therein alleged are within my personal knowledge, and the said bill is true, as I verily believe.

(Signed) O. M. BROCKETT.

Subscribed and sworn to before me by the said O. M.
16 Brockett this 7th day of October, 1913.

(Signed) GENEVIEVE WILLIAMS,
[NOTARIAL SEAL.] *Notary Public in and for Polk County, Iowa.*

(Endorsed:) Filed October 7, 1913. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

17 "EXHIBIT A."

Smoke Ordinance.

Ordinance No. 1870, Adopted by the City Council September 6, 1911.

18 An ordinance declaring the emission of dense smoke within the city of Des Moines a public nuisance and prohibiting the same; providing for the appointment of a smoke inspector, fixing his compensation and the fees of his office.

Be It Ordained by the City Council of the City of Des Moines:
SECTION 1. The emission of dense smoke from the smoke stack

of any locomotive or engine, or from the smoke stack of any stationary engine, or from the smoke stack, chimney or fire-place of any building or plant anywhere within the city of Des Moines shall be deemed, and is hereby declared to be a public nuisance, and is hereby prohibited except as hereinafter provided.

SECTION 2. The owner or owners of any locomotive engine, and the general manager, superintendent, yard-master or other officer of any railroad company having charge or control of the operation of any locomotive engine, who shall cause, permit or allow dense smoke to issue or be emitted from the smoke stack of any such locomotive engine within the city of Des Moines, except as hereinafter provided, shall be deemed and held guilty of creating a public nuisance, and of violating the provisions of this ordinance.

SECTION 3. The owner, lessee or occupant of any building or plant, and the fireman, engineer or any other person having charge or control of any furnace, fire-place or stationary engine, who shall cause, permit or allow dense smoke to issue or be emitted from the smoke stack, fire-place or chimney of any such building or plant, or from the smoke stack, fire-place or chinney connected with any such plant, furnace or stationary engine within the city of Des Moines, except as hereinafter provided, shall be deemed and held guilty of creating a public nuisance, and of violating the provisions of this ordinance.

SECTION 4. There is hereby established as a part of the Department of Public Safety a Department of Smoke Inspection, the head of which shall be known as the Smoke Inspector.

SECTION 5. The Smoke Inspector shall be appointed by the City Council, and the person so appointed shall be qualified by training and experience in the theory and practice of the construction and operation of steam boilers and furnaces in their relation to smoke abatement and the prevention of the emission of dense smoke therefrom. He shall, before entering upon his duties execute a
19 bond with the City of Des Moines in the sum of $1,000.00, the sureties to be approved by the City Council, conditioned upon the faithful performance of the duties of the office. His salary shall be fixed by the City Council.

SECTION 6. The City Council shall appoint a Smoke Abatement Commission, composed of five (5) members, who shall act as advisors to the Smoke Inspector in the conduct of the department. The Smoke Inspector shall at all times receive, place and keep on file in his office all suggestions, recommendations, advice and other communications which may be presented to him in writing by the Smoke Abatement Commission.

SECTION 7. No new plants or any reconstraction of old plants for producing power and heat, or either of them, either for sale or manufacturing purposes, or any new chimney, furnace or fire-place connected with such plant or any steam plant shall be erected or maintained in the city until plans and specifications of the same have been filed in the office of and approved by the Smoke Inspector, and a permit issued by him for such erection, reconstruction or maintenance; provided, that in case of controversy as to the sufficiency

of such plans and specifications and the provisions made therein for fuel combustion said plans and specifications shall be submitted to the Smoke Abatement Commission, one of whom shall have had experience in the installation and conduct of power and heating plants. The decision of said Board shall be binding upon all parties. Such plans and specifications shall show the amount of work and the amount of heating to be done by such plant and all appurtenances thereto, including all provisions made for the purpose of securing complete combustion of the fuel to be used and for the purpose of preventing smoke, and shall also contain a statement of the kind of fuel proposed to be used. Upon the approval of such plans and specifications, a duplicate set of which shall be left on file, and upon the payment of the fees as hereinafter provided the Smoke Inspector shall issue a permit for the construction, erection or maintenance of such plant. As soon as the Smoke Inspector has examined the plans and specifications submitted and has issued a permit as above provided, it shall be the duty of the Inspector to see that the execution of the work permitted is carried out in conformity with the plans and specifications with special reference to the amount of space used, and size and construction of chimneys used, and the provisions for the prevention of smoke.

SECTION 8. It shall be unlawful for any person to use any new or reconstructed plant for the production and generation of heat and power, or either of them, either for sale or manufacturing purposes, until he shall have first procured a certificate from the Smoke Inspector that the plant is so constructed that it will do the work required, and that it can be so managed that no dense smoke shall be emitted from the chimney connected with the furnace or firebox, except as permitted in this ordinance.

SECTION 9. No owner shall alter or repair any chimney, fire-place or any old furnace or device which alteration, change or installation shall affect the method or efficiency of preventing smoke, without first submitting plans and specifications to the Smoke Inspector and securing a permit therefor. In case of controversy the plans and specifications herein required shall be submitted to the Smoke Abatement Commission as provided in Section 7 hereof; provided, however, that minor necessary or emergency repairs which do not increase the capacity of such plant or which do not involve any substantial alteration in structure, and which do not involve any alteration in the method or efficiency of smoke prevention may be made by or under the engineer in charge of said plant without a permit. A violation of this section shall subject the guilty party to a fine of not to exceed $25.00 for each day upon which he shall prosecute such alterations, change or installation without a permit, and each day's violation shall constitute a separate offense.

SECTION 10. The fees for the inspection of plans and issuing of permits and for the inspection of plants and issuing of certificates shall be as follows:

For inspecting plans and new plants and plants about to be reconstructed, $1.50.

For inspecting plans for repairs and alterations, $1.50.

For examining a plant after its erection or reconstruction and before its operation and maintenance, $1.50.

The fee paid for the inspection or examination shall include the issuing of a permit or certificate, in case such permit or certificate is granted. No fees shall be charged for detached residences.

SECTION 11. The issuance and delivery by the Smoke Inspector of a permit or certificate for the construction or reconstruction, or for the alteration or repair of any plant, fire-place or chimney connected with the plant, shall not be held to exempt any person or corporation to whom any such permit has been issued or delivered or
21 who is in possession of any such permit from prosecution on account of the emission or issuance of dense smoke contrary to the provisions of this ordinance.

SECTION 12. The city shall provide such instruments, books, papers and equipment as shall be necessary for the proper performance of the duties of the Smoke Inspector, and he shall have charge of such instruments, books, papers and equipment, and shall deliver the same to his successor in office.

SECTION 13. The Smoke Inspector shall cause to be kept in his office a complete record of all plans submitted, and of all permits issued and of all examinations of plants made and also all certificates issued. He shall make a report of the work of his department to the City Council, annually, on or before the first day of April, and at other times as often as required by the City Council.

SECTION 14. If any Smoke Inspector acting on behalf of the city under the provisions of this chapter shall take or receive any money or any valuable thing or favor for the purpose of favoring any person or persons, or if any inspector shall recommend the issue of any certificate of inspection without having at the time stated thoroughly examined and tested the furnace, device or apparatus so certified, he shall be subject to a fine of one hundred dollars for each offense, and it shall be the duty of the Council to promptly suspend from office any Smoke Inspector against whom a charge of this kind is made, and upon conviction to promptly remove said Inspector from office.

SECTION 15. For the purposes of this ordinance "Chart" when used means Ringelmann's Smoke Chart as published and used by the United States Geological Survey.

"Stack" means any chimney, smoke stack or other structure whether of brick, metal or other material intended for the emission of smoke. Smoke-jacks on locomotive round houses shall be deemed stacks and a part of the locomotive beneath them for the time being.

SECTION 16. The emission of dense smoke of a degree of density of No. 3 of the Chart or greater for more than six (6) minutes in any one hour from any stack, chimney, smoke stack or other structure for the purpose of emitting smoke except as hereinafter provided is hereby prohibited; provided, however, that until January 1, 1913, smoke of a degree of darkness or density equal to No. 3 of the Chart or greater may be emitted for not more than eight (8) minutes in any one hour; provided further, that in the case of
22 locomotive engines the emission of dense smoke of a degree of density of No. 3 of the Chart or greater for more than

forty (40) seconds in any one period of five (5) minutes is prohibited after the 1st of January, 1913, and until the 1st of January, 1913, smoke of the degree of density No. 3 of the Chart or greater is prohibited for more than one (1) minute in any period of five (5) minutes; provided, further, that the stacks of locomotives moving trains of six cars or more may be permitted to emit smoke in any five minute period for twenty (20) seconds in excess of that already provided for in this act, and that stacks of locomotives in and about round houses may emit smoke of a degree of density of No. 3 of the Chart or greater for sixty (60) minutes during the period when the fire is being built or rebuilt after cleaning the boiler. The number of minutes or seconds during which the smoke may be emitted in any period as provided in this section shall be deemed to mean the aggregate number of minutes or seconds, and such minutes or seconds need not be consecutive.

SECTION 17. The Council may by resolution divide the city into districts and may except from the provisions of this ordinance chimneys emitting smoke from brick and tile kilns or other plants within districts outside of the central part of the city.

SECTION 18. It shall be the duty of the Smoke Inspector to enforce the provisions of this ordinance, to investigate all complaints made with reference to any violations thereof. Upon the filing with said Inspector of a complaint it shall be his duty to proceed at once, either by himself or his assistants, to take observations of the stacks or chimneys complained of, testing the density of the smoke by the Chart hereinbefore referred to, and it shall be his duty to keep a record of all such observations, which observations and records shall be open to public inspection at reasonable time and under reasonable regulations. It shall be the Inspector's duty to prosecute all persons violating the provisions of this ordinance regulating the emission of dense smoke, and in all cases where the punishment by fine fails to abate the nuisance he shall cause to be brought in the district court in and for Polk county, an action for the abatement thereof. All such prosecutions shall be in the name of the City of Des Moines.

SECTION 19. Temporary permits for the emission of smoke covering periods not exceeding six months from July 1, 1911, may be granted by the Council to any person duly applying for the same and satisfying the Council that he will make changes or improvements to prevent the emission of smoke in violation of the
23 provisions hereof, but after July 1, 1912, no further permits shall be granted unless the Council is satisfied that public convenience requires it, and permits so granted shall be for a period not exceeding six months.

SECTION 20. On and after the passage of this ordinance and until the 10th day of April, 1912, all of the duties herein enjoined upon the Smoke Inspector shall be performed by the person filling the office of Fire Marshal.

SECTION 21. Any person or corporation who shall violate any of the provisions of this ordinance, except as herein otherwise provided,

shall be fined not less than $10.00 nor more than $100.00 for each offense.

SECTION 22. This ordinance being deemed urgent and necessary for the public peace, health and safety, shall be in full force and effect from and after its passage and publication as provided by law.

Passed Sept. 6, 1911.

Signed Sept. 6, 1911.

JAS. R. HANNA, *Mayor.*

Attest:

HORACE SUSONG,
City Clerk.

I, Horace Susong, City Clerk of the City of Des Moines, hereby certify that the above and foregoing is a true copy of an ordinance passed by the City Council of said City at a meeting held September 6, 1911, signed by the Mayor September 6, 1911, duly recorded and published as provided by law September 23, 1911.

HORACE SUSONG,
City Clerk.

24 And thereafter, towit: on the 27th day of October, A. D. 1913, there was filed by the defendants in said cause a Motion to Dismiss, which is in words and figures as follows, towit:

In the District Court of the United States for the Southern District of Iowa, Central Division.

In Equity.

NORTHWESTERN LAUNDRY et al., Complainants,
vs.
CITY OF DES MOINES, IOWA; JAMES R. HANNA, Mayor; W. A. Needham, Zell G. Roe, J. I. Myerly, F. T. Van Liew, Commissioners; H. W. Byers, Corporation Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Asst. City Solicitor; Harry McNutt, Smoke Inspector; Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, Geo. France, Members Smoke Abatement Commission, Defendants.

Motion.

Now come the defendants, City of Des Moines, Iowa, James R. Hanna, Mayor; W. A. Needham, Zell G. Roe, J. I. Myerly, F. T. Van Liew, Commissioners; H. W. Byers, Corporation Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Asst. City Solicitor; Harry McNutt, Smoke Inspector; Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, Geo. France, Members Smoke Abatement Commission, and not confessing any of the matters in the bill to be true, move the court to dismiss complainants' bill as to them, and as grounds therefor state:

First. The bill does not state any matter of equity entitling complainants to the relief prayed for, nor are the facts as stated in the

bill sufficient to entitle complainants to any relief against
25 these defendants.

Second. The bill on its fact shows that the complainants have a plain, speedy and adequate remedy at law.

Third. The bill showing on its face that the complainants are all residents of the State of Iowa, and the relief demanded is against an ordinance of the defendant, City of Des Moines, this court is without jurisdiction.

Wherefore, defendants pray the judgment of this court in dismissing complainants' bill, and for costs.

(Signed) H. W. BYERS,
" R. O. BRENNAN,
" ESKIL C. CARLSON,
Solicitors for Defendants.

(Endorsed:) Filed Oct. 27, 1913. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

26 And thereafter to-wit: On the 14th day of January A. D. 1914 the following proceedings were had in said cause:

No. 15-A, Eq.

THE NORTHWESTERN LAUNDRY and T. R. HAZARD, Complainants,
vs.
CITY OF DES MOINES, IOWA, et al., Defendants.

On this day this cause came on for hearing, the complainants, appearing by O. M. Brockett, their attorney and the defendants appearing by H. W. Byers, R. O. Brennan and Eskil C. Carlson, their attorneys, after the opening statements of counsel are made the arguments of counsel on the Motion to Dismiss are proceeded with and the same having been concluded and the case being now fully submitted, the same is by the court taken under advisement. It is ordered that the Complainants have leave to amend their bill of complaint.

SMITH McPHERSON, *Judge.*

27 And thereafter, towit: on the 15th day of January, A. D. 1914, an Amendment to Bill of Complaint was filed in said cause, which is in words and figures as follows, towit:

In the District Court of the United States for the Southern District of Iowa, Central Division.

In Equity.

NORTHWESTERN LAUNDRY et al., Complainants,
vs.
CITY OF DES MOINES et al., Defendants.

Amendment to Bill of Complaint.

To the Honorable Judges of the District Court of the United States for the Southern District of Iowa:

The complainants for themselves and for all those persons, firms and corporations on whose behalf the bill of complaint is filed in the above entitled cause, under leave of court first had and obtained, now amend their said bill as follows:

I.

That the industries, plants and enterprises mentioned in paragraph four of the original bill of complaint, include many plants for producing power and heat, either for sale or manufacturing purposes.

II.

That the prosecutions and proceedings complained of in paragraph eleven of the original bill, include some which have been based upon or threatened to be brought for the failure or refusal to comply with the wishes and pleasure of the smoke inspector and smoke abatement commission in the matter of the plans and specifications and character and method of construction for remodeling old plants, chimneys, furnaces or smoke stacks, or the building of new
28 ones, as attempted to be authorized and provided in Sections seven, eight and nine of said so-called smoke ordinance.

III.

To the several subdivisions of paragraph 14 of the original bill charging specific grounds for the claim of invalidity of said ordinance, the complainants and those on whose behalf they bring their bill of complaint, add the following:

18. If sections seven and eight should be construed to apply only to plants for the production of power or heat or both for sale or for manufacturing purposes only, the same is an arbitrary classification, and a discrimination in favor of plants for producing power or heat or both for other purposes, and against those producing the same for the purposes of sale or manufacturing only in violation of the said provisions of the constitution of the United States, and is in excess of the power attempted to be delegated to the City of Des Moines by said act of the legislature of Iowa.

19. In the event that sections seven and eight of said ordinance should be construed as applying only to plants for the production of power or heat or both, either for sale or manufacturing purposes, but not to plants for the production of power or heat for any other purpose, then section nine of said ordinance permits the building of such plants for such other purposes without requiring the submission of plans and specifications therefor, or securing permits therefor, but does require such plans and specifications for the alteration or repair of any existing chimney, fireplace or old furnace of any plant in use for the same purpose; that said discrimination and classification is illegal and violative of the said provisions of the constitution of the United States, guaranteeing the equal protection of the laws, and their uniform operation and due process of law.

20. Section 19 of said ordinance is in violation of said pro-
29 visions of the constitution of the United States because it attempts to vest in the city council of the said City of Des Moines, the final arbitrary and unregulated discretion to suspend the application of all the provisions of said ordinance, and to issue temporary permits for the emission of dense smoke for periods not exceeding six months at any one time in favor of such individuals, firms, corporations plants or industries as the said council may see fit, by mere resolution therefor.

21. That said ordinance was designed to and will, if enforced, compel these complainants and all those on whose behalf they bring this bill, to remodel, reconstruct, or re-equip all existing furnaces, and to procure the said permits therefor.

(Signed) O. M. BROCKETT,
Attorney for Complainants.

UNITED STATES OF AMERICA,
State of Iowa, Polk County, ss:

I, O. M. Brockett, being duly sworn, depose and say that I am the attorney for the Complainants in the foregoing amendment; that I have read the said amendment, and know the contents thereof, and that the matters and things therein alleged are within my personal knowledge, and the said amendment is true, as I verily believe.

(Signed) O. M. BROCKETT.

Subscribed in my presence and sworn to before me by the said O. M. Brockett, this 14th day of January, 1914.

(Signed) GENEVIEVE WILLIAMS,
Notary Public in and for Polk County, Iowa.
[NOTARIAL SEAL.]

(Endorsed:) Filed Jan. 15, 1914. Wm. C. McArthur, Clerk.

30 And thereafter, towit: on the 17th day of January, A. D. 1914, a Decree was filed in said cause, which is in words and figures as follows, towit:

In the District Court of the United States in and for the Southern District of Iowa, Central Division.

No. 15-A, Equity.

THE NORTHWESTERN LAUNDRY and T. R. HAZARD, Complainants,
against
CITY OF DES MOINES, IOWA; JAMES R. HANNA, Mayor; W. A. Needham, Commissioner; Zell G. Roe, Commissioner; F. T. Van Liew, Commissioner; J. I. Myerly, Commissioner; H. W. Byers, Commerce Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector, and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and George France, Members Smoke Abatement Commission, Respondents.

Decree.

This case was submitted to the court on January 14, 1914, on the motion of the defendants to dismiss the bill of complaint herein and to dismiss the case. The said case was fully argued and submitted to the court, and by the court taken under advisement.

Now at this time the court being fully advised sustains said motion and dismisses the bill of complaint herein with prejudice, and dismisses this case with prejudice. Complainant will pay the costs of this action, and if not paid within twenty (20) days, a writ of execution will issue therefor. To each and every of which the said complainants and each of them in open court at the time except.

Done in open court this January 17, 1914.

(Signed) SMITH McPHERSON, *Judge.*

(Endorsed:) Filed January 17th, 1914. Wm. C. McArthur, Clerk.

31 And thereafter, towit: on the 7th day of January, A. D. 1914, an Assignment of Errors was filed in said cause, which is in words and figures as follows, towit:

In the District Court of the United States for the Southern District of Iowa, Central Division.

In Equity. 15-A.

THE NORTHWESTERN LAUNDRY and T. R. HAZARD, Complainants,
vs.
CITY OF DES MOINES, IOWA; JAMES R. HANNA, Mayor; W. A. Needham, Commissioner; Zell G. Roe, Commissioner; J. I. Myerly, Commissioner; F. T. Van Liew, Commissioner; W. H. Byers, Commerce Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Ass't City Solicitor; Harry McNutt, Smoke Inspector, and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and Geo. France, Members Smoke Abatement Commission, Defendants.

Assignment of Errors.

The complainants pray an appeal from the final decree of this court in this cause, to the Supreme Court, and assign for error:

First. That the court erred in sustaining the defendants' motion to dismiss complainants' bill, and in dismissing said bill.

Second. That the court erred in refusing to hold and adjudge in ruling on said motion that complainants' bill states a good cause of action, involving a question arising under the constitution of the United States, entitling plaintiffs to equitable relief, and entitling them to the relief prayed.

Third. That the court erred in refusing in such ruling to hold and adjudge that it had jurisdiction of complainants' cause of
32 action, and of the parties thereto, and that complainants are without any plain, speedy and adequate remedy at law.

Fourth. That the court erred in refusing to hold and adjudge on said ruling, that the so-called "Smoke Ordinance" in question attempts to authorize the deprivation of the complainants and others of their liberty and of their liberty and their property, without due process of law, and to authorize the denial to them of the equal protection of the laws, and the power to enact the same claimed by said City of Des Moines as legislative power delegated to it by the State of Iowa, that the same is therefore in violation of the Fifth Amendment, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. The court erred in refusing to hold and adjudge on said ruling that said smoke ordinance is void because it attempts to authorize and provide for excessive fines and unusual punishment in violation of the eighth amendment to the constitution of the United States.

Sixth. That the court erred in refusing to hold and adjudge on said ruling, that said ordinance violates the equal rights of the complainants with all other persons, to enjoy and defend their liberty, acquire, possess and protect their property and pursue and

obtain happiness, guaranteed to them by Section 1, of the Bill of Rights of the Constitution of the State of Iowa.

Seventh. That the court erred in refusing to hold and adjudge on said ruling, that said ordinance and said acts of the 34th and 35th General Assemblies of the State of Iowa in questionn, violates the protection and rights guaranteed to the complainants by section 6 of the Bill of Rights of the Constitution of the State of Iowa, that all laws of a general nature shall have a uniform operation; and that the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens, and that no person shall be deprived of his liberty or property without due
33 process of law.

Eighth. That the court erred in refusing to hold and adjudge, on said ruling, that said ordinance attempts to vest legislative and judicial power upon the Inspector and Smoke Abatement Commission, therein created and provided for, in violation of Section 1 of Article 3, entitled "Of the Distribution of Powers," of the Constitution of Iowa, separating the state's governmental powers into legislative, executive and judicial departments, and prohibiting any person charged with the exercise of powers properly belonging to one of such departments from exercising any function appertaining to either of the others, except in certain specified cases which do not include that of such inspector and commission.

Ninth. That the court erred in refusing to hold and adjudge, on said ruling, that said acts of the 34th and 35th General Assembles of Iowa, attempt to delegate general, non-delegable legislative power, in violation of section 1, of title "Legislative Department," of the Constitution of the State of Iowa, which provides that the legislative authority of such state shall be vested in its general assembly consisting of a senate and house of representatives; and that said ordinance was passed under sole authority thereof, and is therefore void.

Tenth. That the court erred in refusing to hold and adjudge, on said ruling, that said acts of the 34th and 35th General Assemblies of Iowa, embrace more than one subject and matters properly connected therewith; and embrace one or more subjects not expressed in the title thereof; in violation of prohibition thereof contained in Section 29 of title "Legislative Department," of the Constitution of the State of Iowa; and that said ordinance passed under sole authority thereof is therefore void.

Eleventh. That the court erred in refusing to hold and adjudge on said ruling, that said acts of the 34th and 35th General Assemblies of the State of Iowa, are general laws which could, and
34 should have been made applicable, but which are not of general and uniform application throughout the state, in violation of the requirements of section 30 of title "Legislative Department," of the Constitution of the State of Iowa, and that said ordinance was passed under sole authority thereof and is therefore void.

Twelfth. That the court erred in refusing to hold and adjudge on said ruling, that the constitution of the State of Iowa, is the Supreme

law of the state, and that said acts of the 34th and 35th General Assemblies, and said "Smoke Ordinance", are each void because inconsistent therewith, as required by Section 1, of Article 12, title "Schedule", of said constitution.

Thirteenth. That the court erred in refusing to hold and adjudge on said ruling, that the provisions of said "Smoke Ordinance", are void because in excess of the authority delegated to the City of Des Moines, by either of said acts of the 34th and 35th General Assemblies, or of any other law of the State of Iowa.

Fourteenth. That the court erred in refusing to hold and adjudge on said ruling that complainant's bill shows that said Smoke Ordinance" attempts to declare acts which involve their liberty, and things which are their property, to be nuisances, whereas such acts and things are not nuisances in fact or law, that both the constitution of the State of Iowa and of the United States, in the provisions herein quoted, forbid and prohibit such legislation; and that the State of Iowa, has not attempted to delegate power to the City of Des Moines to so legislate.

Fifteenth. That the court erred in refusing to hold and adjudge on said ruling that said act of the 34th General Assembly of Iowa, was repealed by said act of the 35th General Assembly; that said Smoke Ordinance rested alone for its authority upon said act of the 34th General Assembly, and that the repeal of the latter had the effect of repealing said ordinance or of rendering the same void, and unauthorized by law.

35 Wherefore complainants pray that the decree of said District Court be reversed.

(Signed) O. M. BROCKETT,
Attorney for Complainants.

(Endorsed:) Filed March 7th, 1914. Wm. C. McArthur, Clerk.

36 And afterwards and on the same day, towit: on the 7th day of March, A. D. 1914, a Petition for Appeal and Order allowing same was filed in said cause, which is in words and figures as follows, towit:

In the District Court of the United States for the Southern District of Iowa, Central Division.

In Equity.

THE NORTHWESTERN LAUNDRY and T. R. HAZARD, Complainants,
vs.
CITY OF DES MOINES, IOWA; JAMES R. HANNA, MAYOR; W. A. Needham, Commissioner; Zell G. Roe, Commissioner; J. I. Myerly, Commissioner; F. T. Van Liew, Commissioner; W. H. Byers, Corporation Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector, and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and Geo. France, Members Smoke Abatement Commission, Defendants.

Petition for Appeal.

The above named complainants, conceiving themselves aggrieved by the decree made and entered on the 17th day of January, 1914, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) O. M. BROCKETT,
Attorney for Complainants.

37 Dated this 7th day of March, 1914.

The foregoing claim of appeal is allowed.
(Signed) SMITH McPHERSON,
District Judge.

(Endorsed:) Filed March 7th, 1914. Wm. C. McArthur, Clerk.

38 And thereafter, and on the same day, to-wit: there was filed in said cause an Appeal Bond, which is in words and figures as follows, towit:

Know all men by these presents, that we, T. R. Hazard and the Northwestern Laundry as principals, and Jno. A. Elliott, as surety, are held and firmly bound unto the City of Des Moines, Iowa, James R. Hanna, Mayor, W. A. Needham, Zell G. Roe, J. I. Myerly, F. T. Van Liew, Commissioners, H. W. Byers, Corporation Counsel, R. O. Brennan, City Solicitor, Eskil C. Carlson, Assistant City Solicitor, Harry McNutt, Smoke Inspector, and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and George France, Members Smoke Abatement Commission, in the full and just sum of One Hundred Dollars ($100.00) to be paid to the said obligees, their certain

attorneys, executors administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25" day of February, A. D. in the year of our Lord One Thousand Nine Hundred and Fourteen.

Whereas, lately at a District Court for the 17th day of January, 1914, in a suit depending in said court, between T. R. Hazard and the Northwestern Laundry, plaintiffs, and the City of Des Moines, Iowa, James R. Hanna, Mayor, W. A. Needham, Zell G. Roe, J. I. Myerly, F. T. Van Liew, Commissioners, H. W. Byers, Corporation Counsel, R. O. Brennan, City Solicitor, Eskil C. Carlson, Assistant City Solicitor, Harry McNutt, Smoke Inspector, and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and George France, Members Smoke Abatement Commission, defendants, a decree was rendered against the said T. R. Hazard and the Northwestern Laundry, and the said T. R. Hazard and the Northwestern Laundry having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them
39 to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the — day of —— next.

Now the condition of the above obligation is such that if the said T. R. Hazard and the Northwestern Laundry shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) NORTHWESTERN LAUNDRY,
By T. R. HAZARD, *President*,
T. R. HAZARD,
Principals.

(Signed) JNO. A. ELLIOTT, *Surety.*

Sealed and delivered in presence of

(Signed) ERNEST WILLIAMS.
C. S. FRAZIER.

Approved by

(Signed) SMITH McPHERSON,
Judge of the District Court of the United States for the Southern District of Iowa.

(Endorsed:) Filed March 7th, 1914. Wm. C. McArthur, Clerk.

40 And thereafter, to-wit: on the 16th day of March, A. D. 1914, a Præcipe for transcript of the Record on Appeal was filed in said cause, which is in words and figures as follows, to-wit:

In the District Court of the United States for the Southern District of Iowa, Central Division.

In Equity.

NORTHWESTERN LAUNDRY et al., Complainants,
vs.
CITY OF DES MOINES et al., Defendants.

Præcipe for Transcript of the Record on Appeal.

To the Clerk of said Court:

You will please prepare and certify a transcript of the record in the above entitled cause, to be used on appeal to the Supreme Court of the United States, said record to consist of the following, viz.:

First. Bill of Complaint and Amendment thereto.
Second. Motion by defendants to dismiss Bill and cause.
Third. Record entry of January 14, 1914, submitting cause.
Fourth. Decree.
Fifth. Petition for appeal and order allowing same.
Sixth. Assignment of errors.
Seventh. Appeal bond and order approving same.
Eighth. Citation and acceptance of service thereof.
Ninth. Præcipe for transcript of the record on appeal.

(Signed) O. M. BROCKETT,
Attorney for Appellants.

41 Service of the above præcipe and receipt of copy is hereby acknowledged at Des Moines, Iowa, this 16th day of March, 1914.

(Signed) H. W. BYERS,
R. O. BRENNAN &
ESKIL CARLSON,
Attorney- for Appellees.

(Endorsed:) Filed March 16th, 1914. Wm. C. McArthur, Clerk.

42 UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa hereby certify the foregoing 41 pages to be a full, true and complete transcript of the record of cause No. 15-A-Eq. Central Division Northwestern Laundry, et al., vs. City of Des Moines, Iowa, et al., as called for in the præcipe for transcript of record on appeal filed in said March 16th, 1914, as full true and complete as the original thereof on file and of record in my office in the City of Des Moines in said District.

I further certify that I transmit herewith as part of said transcript the original Citation with acceptance of service thereof by the Attorney for the Appellees.

In witness whereof, I hereunto set my hand and affix the seal of said Court at my office in the City of Des Moines in said District this 20th day of March A. D. 1914.

[Seal U. S. District Court, Southern District of Iowa.]

WM. C. McARTHUR,
Clerk of said Court.

Endorsed on cover: File No. 24,147. S. Iowa D. C. U. S. Term No. 121. The Northwestern Laundry and T. R. Hazard, appellants, vs. The City of Des Moines, Iowa, et al. Filed April 4th, 1914. File No. 24,147.

Supreme Court of the United States, October Term, 1915.

No. 121.

THE NORTHWESTERN LAUNDRY and T. R. HAZARD, Appellants,
vs.
THE CITY OF DES MOINES, IOWA, et al.

Stipulation.

It is stipulated and agreed by the parties to the above action that e recital at the bottom of page twenty of the printed transcript of e record, of this cause, to the effect that "on the 7th day of January . D. 1914, an assignment of errors was filed in said cause," is roneous, and due to the fact that by inadvertence, the clerk of the urt below, in making the transcript for certification to this court, bstituted the word "January" for the word "March," and the clerk this court is now hereby authorized to strike out of said recital e word "January" and to substitute therefore the word "March" in lieu thereof that the court shall treat said recital as if the orig- al had correctly stated the date as herein agreed.

Witness our signature- at Des Moines Iowa, this 9 day of Novem- r, 1915.

O. M. BROCKETT,
Solicitor for Appellant.
H. W. BYERS,
ESKIL C. CARLSON &
E. M. STEER,
Solicitors for Appellees.

[Endorsed:] 121/24,147.

[Endorsed:] File No. 24,147. Supreme Court U. S. October rm, 1915. Term No. 121. The Northwestern Laundry et al., ppellants, vs. The City of Des Moines, Iowa, et al. Stipulation to rrect record. Filed November 15, 1915.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 121

THE NORTHWESTERN LAUNDRY AND T. R. HAZARD,
Appellants,

vs.

THE CITY OF DES MOINES, IOWA, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT FOR APPELLANTS.

Subject Index

TABLE OF CASES.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT.

The appellants complain of the decree of the Court below, dismissing their bill of complaint and the case with prejudice and adjudging the costs thereof against them upon the motion filed by the appellees in the nature of a demurrer, praying such action. The bill (transcript page 2) and the motion, (transcript page 16) therefore, state the case.

It is difficult to so summarize the bill as to secure desired brevity without sacrificing material substance and effectiveness.

Without elaboration of details, it complains of the defendant city and its officers who are engaged in attempts to enforce the ordinance complained of, and charges:

1. That complainant is interested in and engaged in conducting a steam laundry in the defendant city.

2. That the defendant city is a municipal corporation organized under the laws of the state of Iowa, and the other defendants are its several officers charged with the duty of enforcing its ordinances, and engaged in attempts to enforce the one complained of.

3. The complainant's laundry is large and expensive, to the operation of which a smoke stack or chimney, and consumption of a large amount of locally produced coal, is necessary. That the furnace and smoke stacks in use are of standard construction, but not equipped with any modern patented, so-called, smoke consuming device.

4. That many other industries are similarly situated and conducted as respects such use of such coal in the city of Des Moines, the proprietors of which are too numerous to be named as co-complainants, and the bill is presented on behalf of all such class.

5. That the coal so used by the complainants, and of all such class of other users, is produced in or about the city of Des Moines, in great quantities, constituting one of the chief industries of the locality, and is well adapted to such use, and cheaper than any other known method of producing the heat and power requisite for such industries.

6. That whereas, it is possible to so use said coal, and in many cases it is so used, by the ordinary, usual and common method and construction of furnaces, smoke stacks, and chimneys, without thereby creating any nuisance, it is nevertheless impossible to so use said coal without violation of the ordinance complained of. That it would require great, and often prohibitive expense to rebuild and equip existing furnaces and chimneys, if that were possible, or to make a substitute, to meet the requirements of said ordinance.

7. That it is practical to use said coal in the plants, as at present equipped, of the complainants and others for whom the bill is brought, without any such remodeling or substitution, so as not to create a nuisance. That in many cases in which fines have been

assessed, and other prosecutions threatened, no nuisances have been or will be in fact, maintained, although prosecutions have been and will be had, under said ordinance.

8. That the statute of Iowa under pretended authority of which the ordinance complained of was enacted provides:

> Sec. 1. "The emission of dense smoke within the corporate limits of any of the cities of this state now or hereafter having a population of sixty-five thousand (65,000) inhabitants or over, including cities acting under the commission plant of government, is hereby declared to be a public nuisance."
>
> Sec. 2. "Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance."

That prior to the enactment of said statute, which was in 1911, no power had been delegated to the defendant city to prescribe by ordinance the definition of a nuisance, or the punishment for maintenance thereof, or to bring actions in the court to abate them.

9. That under the pretended authority of the above quoted statute the defendant city on the 6th of September, 1911, passed the Smoke Ordinance complained of, the copy of which was attached as "Exhibit "A", to the Bill. (Transcript p. 11 *et seq.*)

10. That the succeeding legislature in 1913 repealed the above quoted statute by an act which provided as follows:

> Sec. 1. "The emission of dense smoke within the corporate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter now or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance.
>
> Sec. 2. "Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment, or by action in the district court of the county in which said city is located, or by both; such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection, and the abatement and prevention of the smoke nuisance.
>
> Sec. 3. "That chapter thirty-seven (37) of the laws of the Thirty-fourth general assembly be and the same is hereby repealed."

11. That before and since the enactment of said repealing statute the defendants commenced and prosecuted numerous charges of violation of said ordinance against the complainants and the class of persons for whom the bill is brought, and therein assessed many fines, and are threatening, and will, if not restrained, continue so to do.

12. That the proceeding involves an aggregate of more than $3000.00 exclusive of interest and costs and the construction of the provisions of the constitution of the United States which, (1). prohibit the taking of the complainant's property without due process of the law and (2) guarantee the equal protection of the law.

13. That said ordinance violates the thirteenth amendment of the constitution of the United States, because it deprives complainants of their property without due process of law and deprives them of equal protection of the law.

14. That said ordinance is void because:

(a) its standard of efficiency requires the remodeling of practically all furnaces which were in existence at the time of its adoption.

(b) it forbids remodeling or substituted equipment without a prescribed license.

(c) it forbids new construction without such license.

(d) it fails to specify approved equipment and instead delegates, first to the inspector, and second, to the smoke abatement commission, the unregulated discretion to arbitrarily prescribe the requirements in each case, without reference to any other, as to the required character of smoke prevention device; thus placing the right of complainants and their class to own and operate said furnaces at the pleasure of such inspector and commission, thereby taking their property without due process of law, and depriving them of the equal protection of the law.

(e) It exceeds the authority delegated to the city by the legislature.

(f) Such ordinance attempts to substitute its own definition of the crime of nuisance, committed by the emission of dense smoke, for that enacted by the legislature in the act under the pretended authority of which the ordinance is adopted.

(g) Said ordinance is unreasonable and tyrannical.

(h) It is unreasonable and exceeds the authority delegated, for want of uniformity as to the whole city, and because exceptions specified are not natural and just; because it prescribes arbitrary tests of degrees of density, and enables the inspector to present unrebuttable proof of violation, and for unlimited prosecutions and successive fines, constituting excessive punishment in the aggregate, without adequate remedy or relief, and undertakes to deprive the courts of power to determine whether the nuisances have in fact been committed or maintained.

(i) Said ordinance is void because said act of the legislature, which is its sole authority, is void because the first section is an act

of the legislative power of the state declaring for the state that the emission of dense smoke within specified cities is a public nuisance; while section two is an attempt to delegate to such cities the power to complete the legislation for the state on the subject, and therein seeks to prescribe its own punishment for the statutory crime denounced in the first section, whereby varying punishments will result in such cities of the state for the same offense against the law of the state.

(j) Said statute is void because it is an attempt to split the legislative power of the state upon the same subject, the legislature exercising it by the general enactment denouncing for the whole state an act committed in specified cities, as a public offense, and then attempts to delegate to such municipal corporations the power to complete the legislation by prescribing the punishment and means of prevention of such offense.

(k) Such statute is void because it attempts to authorize legislation which shall not be uniform in its effects upon all persons upon the same terms and conditions.

(l) Said statute is void because its limitation to cities of 65,000 population and over makes it applicable alone to the city of Des Moines, and the classification is otherwise arbitrary and without other than purely fictitious basis, because the act denounced can by no possibility be any the less a nuisance under the same circumstances in cities of less population.

(m) Said ordinance is void because the legislative power it attempts to exercise, is vested solely in the state legislature and is nondelegable. The subject matter of the legislative act of 1911, which attempts to authorize a provision for punishment by ordinance, is beyond the subject matter expressed by the title of the act.

(n) Said statute was repealed by the act of 1913, whereby the authority for the ordinance was withdrawn.

(o) If it be held that any part of the act of 1911 was reenacted by the act of 1913, then both are void for all reasons urged against the former, and, because considered separately and taken together, they show that the classification of the cities to which they severally apply is purely fictitious and both acts constitute special and class legislation under the constitution of the state of Iowa, and of the United States.

15. That the several defendants claim to be charged with the official duty of enforcing the several provisions of said ordinance, and to that end have brought and prosecuted, and threaten to bring and prosecute a multiplicity of criminal proceedings, and are threatening to bring a multiplicity of actions to enjoin and abate the use of furnaces and smoke stacks operated by the complainants and the class for whom the bill was filed, all of whom will be greatly harassed, annoyed and oppressed thereby, and all of whom are without plain, speedy, and adequate remedy other than that sought by the bill, and without which they will suffer irreparable injury.

16. The prayer, in brief, is, that the ordinance be decreed void, and that the defendants and successors in office, be enjoined from all attempts to enforce the same and for general equitable relief.

17. The smoke ordinance ("Exhibit A", transcript p. 11) is lengthy, being comprised in twenty-two sections: 1, attempts to substitute a new definition for the nuisance; 2 and 3, designate who may be held responsible for it; 4, 5 and 6, create the department of smoke inspection; 7, attempts to confer arbitrary authority on the smoke inspector to withhold approval of plans and specifications for remodeling old plants, or the construction of new ones; 8, attempts to make it unlawful to modify or construct such plants without such approval; 9, prescribes a penalty for doing so without such approval either by the inspector or the commissioners; 10, provides fees which may be exacted for the inspection of plans and specifications, and for the examination of plans, and issuance of permits; 11, that such permits shall be no protection against such prosecutions; 12, 13 and 14, relate to the duties of the inspector; 15 and 16, arbitrarily fix the test for the determination of the question of fact as to when smoke emitted is of the requisite density and duration to constitute the offense. Density equal to number 3 of Ringleman's chart for more than six minutes in some cases, and other periods in other cases, is prescribed as the test; 18, requires the inspector, upon complaint being made, to take observations and apply such tests and to prosecute all cases where the smoke is in excess of such test; 19, provides for licenses or exemptions from prosecution in certain cases; 20, imposes interim duties of the inspector on the fire marshall; and 21 prescribes that as a punishment for the violation of any of the provisions, except in cases of exemption, fines of not less than $10 to $100.

An amendment to the bill recites; 1, that the industries, plants and enterprises named in paragraph four of the original bill include many plants engaged in producing heat and power for manufacturing purposes or for sale; 2, that prosecutions complained of in paragraph eleven of the original bill include some which have been based upon, or threatened to be brought for, failure or refusal to comply with the wishes of the smoke inspector, or commission, as to plans and specification, character and method of remodeling old plants, chimneys, and furnaces, or the building of new ones; 3, to paragraph 14 of the original bill, additional grounds for claim of invalidity of the ordinance are declared as follows; 4, if sections 7 and 8 of the ordinance apply only to plants for the production of heat and power, or both for sale, or manufacturing purposes only, it is an arbitrary classification and a discrimination in favor of plants for producing power or heat, or both, for other purposes, and against those producing the same for the purposes of sale or manufacture only, in violation of the specified provisions of the constitution of the United States, and is in excess of the power attempted to be delegated to the city of Des Moines by said act of the legislature of Iowa; 5, if sections 7 and 8 of the ordinance apply

only to plants for the production of heat or power, for sale or manufacture, but not to the plants producing the same for other purposes, then said sections permit the building of such plants for such other purposes, without requiring plans, specifications, or permits therefor, but does require them for alteration of any existing furnace or chimney, in use for the same purpose. That such discrimination and classification is illegal, and violates the specified provisions of the constitution of the United States guaranteeing the equal protection of the laws, their uniform operation, and due process. 6, Section 19, of said ordinance is in violation of said provisions of the constitution of the United States because it attempts to vest in the council of the defendant city final, arbitrary, and unregulated discretion to suspend the application of the provisions of said ordinance, and to issue permits for their violations for specified periods not exceeding six months at any one time to such parties as the counsel may choose by mere resolution therefor. 7. That, if enforced, said ordinance will compel the persons for whom the bill is brought to remodel, reconstruct or reequip, all existing furnaces and to secure said permits therefor.

The joint motion by all the defendants assailing the bill as amended, asserts; 1st, the bill does not state any matter of equity entitling complainants to the relief prayed, nor are the facts, as stated in the bill, sufficient to entitle complainants to any relief against defendants; 2nd, the bill shows on its face that the complainants have a plain, speedy, and adequate remedy at law; 3rd, as it appears on the face of the bill that complainants are all residents of the state of Iowa, and the relief demanded is against an ordinance of the defendant city, the court is without jurisdiction.

Prayer for judgment dismissing the bill and for costs.

Upon the issues thus presented the court sustained said motion and entered decree dismissing the bill of complaint and the case, with prejudice, and adjudged the costs against complainants, to all of which they excepted. (Transcript p. 20.)

Specifications of Errors Relied Upon.

The decree is erroneous in that;

1st, the court should have overruled the motion;

2nd, thereon the court should have adjudged that the bill involves a question arising under the constitution of the United States and entitles plaintiff to equitable relief and to the relief prayed;

3rd, that it should have adjudged that it had jurisdiction of the parties and subject matter of the action and that complainants are without any other plain, speedy, adequate remedy;

4th, that said ordinance should have been adjudged an attempted deprivation of complainants of their liberty and property without due process of law, and denial to them of the equal protection of the law, and a constitutionally prohibited attempt to delegate legislative power and a violation of the Fifth Amendment, and of sec-

tion one of the Fourteenth Amendment, to the constituion of the United States;

5th, the decree should have adjudged the ordinance void, because it authorizes denial to them of equal protection of the laws, as prohibited by the Fifth Amendment, and Section 1 of the Fourteenth Amendment to the constitution of the United States;

6th, invalidity of the ordinance should have been decreed because of its authorization of excessive fines and unusual punishments in violation of the Eighth Amendment to the Constitution of the United States;

7th, judgment of invalidity of said ordinance should have been awarded because of its denial of the equal rights of the complainants with all other persons to enjoy and defend their liberty, acquire, possess and protect their property, and pursue their happiness, as secured to them by Section 1 of the Bill of Rights of the Constitution of the State of Iowa;

8th, the ordinance, and said statutes of 1911 and 1913, should have been decreed void because repugnant to Section 6 of the Bill of Rights of the constitution of the State of Iowa, which provides that all laws of a general nature shall have a uniform operation; and that the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens, and that no person shall be deprived of his liberty or property without due process of law. (See Assignment of Errors, transcript p. 21.)

BRIEF OF ARGUMENT.

I.

Injunction lies to restrain enforcement of invalid municipal ordinances, the execution of which injuriously affects private rights.

Deems v. Mayor of Baltimore, 80 Md. 164; 45 Am. St. Rep. 339;

Port of Mobile v. Louisville R. Co., 84 Ala. 115 Am. St. Rep. 342 and note;

Stevens v. St. Mary's Training School, 143 Ill. 336; 36 Am. St. Rep. 438;

Austin v. Austin City Cemetery Assn., 87 Tex. 330;

Bear v. City of Cedar Rapids, 147 Iowa, 341.

II.

It is a violation of the 14th amendment to the Constitution of the United States to vest in any officer or body of officers wholly arbitrary and unregulated discretion to grant or withhold licenses to hold and enjoy the natural and lawful rights of property and occupation, as is attempted by provisions of the ordinance complained of.

Yick Wo. v. Hopkins, 118 U. S. 359, 6 Sup. Ct. Rep. 1064 L. Ed. 220;

City of Richmond v. Dudley, (Ind.) 129 Ind. 112; 28 N. E. 312; 13 L. R. A. 587; 28 Am. St. Rep. 180;
Grainger v. Douglass Park Jockey Club, (C. C. 6th C.) 148 Fed. 513.

III.

Prior to the enactment of Chapter 37 of the acts of the 34th G. A. of Iowa, it was well settled law in this state that cities had no power to declare what should constitute nuisances, or prescribe punishment for their maintenance, nor to bring actions in court for their abatement.

Everett v. Council Bluffs, 46 Ia. 66;
Cole v. Kegler, 64 Ia. 59;
Nevada v. Hutchins, 59 Ia. 506;
Knoxville v. C. B. & Q. R. R. Co., 83 Ia. 636;
Chariton v. Barber, 54 Ia. 306;
City of Ottumwa v. Chinn, 75 Ia. 407.

IV.

If the repealing clause, found in the 3rd section of the act of the 35th general assembly, in fact repealed the act of the 34th general assembly, the only authority claimed for the offensive ordinance was thereby withdrawn and said ordinance was therefore nullified.

Martin v. City of Oskaloosa, 99 N. W. 557;
Pritchard v. Savannah Street and Rural Resort Ry. Co., (Ga.) 14 L. R. A. 712;
City of St. Louis v. Kellman, 139 S. W. 433, 235 Mo. 687.

V.

Was the act of the 34th general assembly repealed by the act of the 35th general assembly?

(a) *U. S. v. Musgrave,* (U. S. D. C. Ark.) 160 Fed. 700;
U. S. v. Ninety-nine Diamonds, 139 Fed. 961;
Kunkalman et al., v. Gibson, (Ind.) 84 N. E. 985.

(b) *Construction—Legislative Intent.*
Elmer v. U. S., 45 Ct. Cl. 90;
Freeman v. People, (Ill.) 89 N. E. 667;
People v. McCullough, 143 Ill. App. 112;
Rockingham County v. Chase, (N. H.) 71 Atl. 634;
Hampton v. Hickey, (Ark.) 114 S. W. 707;
Thorton v. State, 63 S. E. 301;
City of Buffalo v. Lewis, (N. Y.) 84 N. E. 809;
Milligan v. Arnold, (Ind.) 98 N. E. 822;
Pettiti v. State, 121 Pac. 278.

(c) *Repeal by Reenactment.*
Murphy v. Utter, 22 S. Ct. 776, 186, U. S. 95, 46 L. Ed. 1070;
United States v. Tynen, 11 Wal., 88, 20 L. Ed. 153;
36 Cyc. 1077-8;
Child v. Shower, 18 Iowa, 272;
Allen v. City of Davenport, 107 Ia., 90;
Ogden v. Witherspoon, 18 Fed. Cas. No. 19461, 3 N. C. 227.

VI.

The provisions of the ordinance which are the basis for the prosecutions complained of are in excess of the authority delegated by the acts of the 34th and 35th General Assemblies in question.
Clark, Dodge & Co. v. City of Davenport, 14 Ia., 500;
Tuttle v. Church, 53 Fed. Page 425.

VII.

The features of the ordinance here involved are void for unreasonableness.
Davis v. Anita, 73 Ia., 325;
State Center v. Barenstien, 66 Ia., 249;
Meyers v. Chicago etc. R. Co., 57 Ia., 555;
Munsell v. Carthage, 105 Ill., App. 119;
Everett v. Council Bluffs, 46 Ia., 66;
Bush v. Dubuque, 69 Ia., 233;
Centerville v. Miller, 57 Ia., 56;
St. Louis v. Heitzberg Packing etc. Co., 141 Mo., 375, 42 S. W. 954, 64 Am. Rep. 516, 39 L. R. A. 551.

VIII.

The second section of the acts of the 34th and 35th general Assemblies, if construed to delegate authority to enact ordinances containing the provisions in question, are void because repugnant to both the State and Federal Constitutions.

(a) Because the statutory denunciation of the emission of dense smoke as a "public nuisance," found in the first section of the act of the 34th G. A. makes the act of maintenance a misdemeanor, which thereby became punishable as such under the provisions of sections 4905 and 4906, of the Code of Iowa, which read as follows:

> Sec. 4905. "When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.

> Sec. 4906. "Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Having so enacted as to make the offense so punishable, the legislature could not furthermore delegate to specified cities the legislative power to prescribe additional punishment involving repeated jeopardy for the same act.

(b) Because such legislative power is non-delegable, being vested exclusively in the legislature, by section 1 of that part of the constitution of the state of Iowa which is entitled "Legislative Department," next following "Article 3" thereof, and which is as follows:

> "The legislative authority of this state shall be vested in a General Assembly which shall consist of a senate and a house of representatives; and the style of each law shall be—'Be it enacted by the General Assembly of Iowa.'"

(c) Because it attempts to authorize unequal and discriminatory punishments of different persons under precisely the same circumstances for the same offense by leaving it to the favored cities to determine such punishment severally, according to the discretion or caprice of each, in violation of section 6 of the Bill of Rights of the Constitution of the State of Iowa, which provides:

> "All laws of a general nature shall have a uniform operation: the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens."

(d) Because the classification of the favored cities is capricious and artificial, rendering the acts violative of the Fifth Amendment, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e) Because of arbitrary classification and discrimination found in sections 7 and 8 of the ordinance in favor of plants producing power or heat, or both, for purposes other than manufacture or sale, and placing the restrictions thereof solely on those plants employed to produce heat or power for manufacture or sale; except that said favored class of plants is therein subdivided and further classified into those constructed after the passage of the ordinance, and those then in existence but requiring alteration; plans, specifications and permits being required for the latter, while the former are exempt from all such requirements; which latter feature is also a prohibited inequality and discrimination under the cited provisions of the state and Federal Constitutions.

(f) Because the provisions of the ordinance prescribing an unlimited number and aggregate, of fines for a single continuous maintenance of an alleged nuisance, depending on the duration of such maintenance as a multiple of certain arbitrarily fixed short divisions of time, constitutes excessive fines and unusual punishment prohibited by Article XIII of Amendments to the constitution of the United States, and by the similar provision in Section 17 of Article 1, entitled "Bill of Rights," of the constitution of the state of Iowa.

Town of Neola v. Reichart, 131 Ia., 492;
Iowa City v. McInnery, 114 Ia., 586;
Bloomfield v. Trimble, 54 Ia., 399;
Bear v. City of Cedar Rapids, 141 Ia., 341;
State v. Benke, 9 Ia., 203;
Geebrick v. State, 52 Ia., 401;
State v. Weir, 33 Ia., 134;
Weir v. Cram, 37 Ia., 649;
Court v. Des Moines, 80 Ia., 626;
State ex rel v. Mayor of Des Moines, 108 Ia., 36;
Dowling v. Lancashire Ins. Co., (Wis.), 31 L. R. A. 112;
State v. King, 37 Ia., 649;
Des Moines v. Hillis, 55 Ia., 643;
Robert J. Boyd Paving & Construction Co. v. Ward, 85 Fed. 27;
State v. Copeland, 69 N. W. 27;
State v. Tower, 84 S. W. 10;
State v. City of Orange, (N. J.), 36 Atl. 706.

IX.

The trial court had, and this court now has, jurisdiction of the parties hereto, and of the subject matter in controversy in this suit, because it involves the construction of the provisions of the constitution of the United States prohibiting the taking of the plaintiff's property without due process of law, and guaranteeing equal protection of the law; and because the complainants in good faith believe that such questions are involved.

Chap. 2 of Judiciary Act of 1912. (Public No. 475.) (S. 7031.), particularly Subdivision Fourteenth of Sec. 24 of said act; and cases cited under corresponding section in Fed. Stat. Ann., particularly in note beginning on p. 281 Vol. IV.

X.

Because the court has jurisdiction of the subject matter and parties to determine questions at issue arising under the constitution of the United States, it also has, and the trial court had, jurisdiction to determine all other matters in issue.

(We must be permitted to assume this is too familiar law to leave occasion to cite authorities.)

ARGUMENT.

I.

Injunction lies to restrain enforcement of invalid municipal ordinances, the execution of which injuriously affect private rights.

Where there is no adequate remedy at law, and it is necessary to prevent irreparable injury, injunction will be granted to restrain the enforcement of invalid ordinances.

Deems v. Mayor of Baltimore, 80 Md. 164; 45 Am. St. Rep. 339.

Note to the latter report of the case cites *Port of Mobile v. Louisville R. Co.*, 84 Ala. 155; 5 Am. St. Rep. 342 and note. *Stevens v. St. Mary's Training School*, 143 Ill. 336; 36 Am. St. Rep. 438.

Austin v. Austin City Cemetery Assn., 87 Tex. 330; 47 Am. St. Rep. 114.

A note to the latter report of this case cites *Deems v. Mayor of Baltimore, supra.*

Bear v. City of Cedar Rapids, 147 Iowa, 341.

II.

The provisions of the Des Moines Smoke Ordinance are designed to compel owners and operators of existing furnaces and smoke stacks to remodel the same and install patented smoke consuming devices. It requires plans and specifications for such proposed remodeling and equipment to be inspected by the inspector, and smoke abatement commission, and the procurement from them of a permit or license before any such change can be lawfully made. The same conditions are required for the privilege of constructing any new furnaces and smoke stacks. The ordinance does not fix any test or terms and conditions upon which it shall become the duty of the inspector and commission to issue such permit or license. Their discretion to grant or withhold such licenses is wholly unregulated. (See Ordinance "Exhibit" "A", transcript page 11 *et seq.)*

This is a violation of the Fourteenth Amendment to the Constitution of the United States.

Yick Wo. v. Hopkins, 118 U. S. 359, 6 Sup. Ct. Rep. 1064, L. Ed. 220.

The point ruled in this case is stated in the head note thus:

> It is "a breach of the Fourteenth Amendment to the Constitution to empower any man or body of men, at his

or their absolute and unrestrained discretion, to give or withhold permission to carry on a lawful business in any place."

Bear v. City of Cedar Rapids, supra;

City of Richmond v. Dudley, (Ind.) 129 Ind. 112; 28 N. E. 312; 13 L. R. A. 587; 28 Am. St. Rep. 180,

following, *Yick Wo. v. Hopkins.*

The opinion in the Richmond case, after citing and quoting from several of the decisions on the subject including the *Yick Wo* case, states the conclusion of the court as follows:

> "It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise or of an opportunity for the exercise of any arbitrary discrimination by the municipal authorities between citizens who will so comply."

For general review of cases on the subject and statement of the rule see

Grainger v. Douglas Park Jockey Club, (C. C. 6th C.) 148 Federal 513.

III.

Prior to the Enactment of Chapter 37 of the acts of the 34th G. A. of Iowa, it was well settled law in this state that cities had no power to declare what should constitute nuisances, or prescribe punishment for their maintenance, nor to bring actions in court for their abatement.

Everett vs. Council Bluffs, 46 Ia., 66;
Cole vs. Kegler, 64 Iowa, 59;
Nevada vs. Hutchins, 59 Ia., 506;
Knoxville vs. C. B. & Q. R. R. Co., 83 Ia., 636;
Chariton vs. Barber, 54 Ia., 360.

In 28 Cyc. 715 it is said:

> "A municipality cannot, however, make a thing a nuisance by merely declaring it to be such, but it is limited to such things as the common law or statute declare to be nuisances, and perhaps those things which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. A municipality cannot arbitrarily and without support of reason or fact declare that which is harmless a nuisance; nor although empowered by law to declare what shall constitute a nuisance,

can it declare that to be a nuisance which is not such in fact."

Everett vs. Council Bluffs, supra, is cited in support of the last statement of the text. In that case a threatened removal of a so-called nuisance under authority of a city ordinance was by the supreme court ordered enjoined. In part, the opinion says:

> "The defendant is incorporated under a special charter which provides that the city council has power 'to declare what shall be a nuisance, and to prevent, remove or abate the same.' This general grant of power, however, will not authorize the council to declare anything a nuisance which is not such at common law, or has been declared such by statute. Wood on Nuisances, Sec. 772. In *Yates vs. Milwaukee,* 10 Wall., 497, Miller, J., says, 'But the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character."

In *Nevada vs. Hutchins, supra,* the court, in a careful opinion held that the power delegated to cities under Code Sec. 456 to abate nuisances did not confer the power to prescribe punishment for them. The court adopts the rule of prior cases denying similar power to cities, under the delegation of authority to suppress and restrain gambling houses. The opinion makes the point that the thing complained of as a nuisance was explicitly made so by statute, and adds:

> "Having in express terms prescribed the power over this subject, under the authority of cases above cited such power cannot be extended."

In *City of Ottumwa vs. Chinn,* 75 Ia., 407, it was held that Sec. 456 of the Code of Iowa does not authorize actions in the name of the city for decrees for the abatement of nuisances, and the existence of the power generally was denied. The rule of statutory construction as to the authority delegated to cities was stated in the opinion as follows:

> "It is a general proposition of law that municipal corporations have and can exercise only those powers granted in express words; those necessarily implied or incident to the powers expressly granted, and those essential to the purposes of the corporation."

IV.

The 3rd Section of chapter 49 of the laws of the 35th G. A. reads as follows:

> "That Chapter 37 of the laws of the 34th general assembly be and the same is hereby repealed." (Transcript p. 16.)

If that provision is literally effective, the ordinance was nullified by the repeal of the statute which alone was relied on for its authority.

On the first submission of *Martin v. City of Oskaloosa*, 99 N. W. 557, the court conceived that this question was necessarily involved in the disposition of the case, and said:

> "With the repeal of the statute, the ordinance which had life only through the continued existence thereof became *eo instante* void, and of no effect. *Wethington v. Owensboro*, (Ky.) 53 S. W. 644; *People v. Brill*, 120 Mich., 42, 78 N. W. 1013."

A subsequent opinion in the *Martin* case reached a contrary conclusion upon ground that did not involve this question, but the rule as stated in the first opinion is sustained by numerous decisions, and without conflict.

In a note to *Pritchard v. Savannah Street and Rural Resort Railway Co.*, (Ga.) 14 L. R. A. 721, citing many cases, several of them from the Supreme Court of the U. S., it is said:

> "If a law conferring jurisdiction is repealed without any reservation as to pending cases all such cases fall with the law."
>
> "The legislaure may repeal a law imposing a penalty, pending an action therefor, and thus defeat the action."
>
> "Or pending an appeal from a judgment therefor, and thus defeat the judgment;"
>
> "or after judgment and before execution."
>
> "The term "repeal" with reference to statutes means the abrogation of a previously existing law by a subsequent statute which either declares that the former shall be revoked, or which contains provisions so irreconcilable with those of the earlier law that only one of the two can remain in force; the former being an express repeal. The term "repeal" is synonymous with "cancel", "annul", "reverse" and "abolish", so that a statute or ordinance is repealed when it is destroyed, abolished, abrogated, canceled, annulled, recalled or rescinded by a later one."
>
> *City of St. Louis vs. Kellman*, 139 S. W. 443, 235 Mo. 687.

And see following in 7 Words & Phrases, page 6012:

> "A repeal signifies the abrogation of one statute by another. *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 60 Pac. 1039, 1042, 24 Mont. 125."
>
> "The primary meaning of the word "repealed" as used in speaking of the repeal of a statute, is, as its etymology imports, that the statute has been recalled or revoked. *Oakland Pav. Co. v. Hilton*, 11 Pac. 3, 6, Cal. 479."
>
> "A repealing clause is such an express enactment as necessarily devests all inchoate rights which have arisen under the statute which it destroys. These rights are but an incident of the statute and fall with it, unless saved by express words in the repealing clause. *Duffus v. Howard Furnase Co.*, 40 N. Y. Supp. 925, 930, 8 App. Div. 567."

V.

Did chapter 49 of the laws of the 35th general assembly repeal chapter 37 of the laws of the 34th general assembly?

(a) It is a cardinal rule of law that where there is no ambiguity in a legislative act, the courts cannot invoke principles of construction to justify judicial interference with literal enforcement.

> "Where the language of a statute is plain and unambiguous, it is not for the court to change it, or to hold that the legislature meant something different."
>
> *U. S. v. Musgrave*, (U. S. D. C. Ark.) 160 Fed. 700.

Sanborn J., for C. C. A. in *U. S. v. Ninety-nine Diamonds*, 139 Fed. 961, said:

> "It is the intention expressed in the statute, and that alone, to which the courts may give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish these supposed intentions. Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning evident. It must be held to mean what it plainly expresses, and no room is left for construction. In *U. S. v. Wiltberger*, 5 Wheat, 76 96, 5 L. Ed. 27, 42, Chief Justice Marshall said:
>
> "The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous in-

deed, to carry the principle that a case, which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

This rule was applied in the case of a repealing statute in *Kunkalman et al. v. Gibson,* (Ind.) 84 N. E. 985. It is said in the opinion at page 987:

"It is useless, however, to philosophize, where there is a plain provision for the repeal of all existing laws on a certain subject. With certain specified exceptions, this court is not authorized to declare a further exception in order to give the statute an equitable operation. * * * We cannot subtract from the broad language of the statute that with certain specified exceptions existing laws are repealed. Unless there is an adequate ground for the conclusion, nothing is to be added to or subtracted from the statutory words of general scope and comprehensiveness. Endlich Interp. Statutes, Sec. 17. As it is said in 26 Am. & Eng. Cyc. of Law (2d Ed.) 601: 'Where the language of a statute is clear, it is not for the court to say that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions. A *casus omissus* can in no case be supplied, for that would be to make laws'. Perhaps no better statement can be found of the doctrine that exceptions should not ordinarily be declared by the courts where the Legislature speaks broadly than is contained in the *City of Pittsburg v. Kalchthaler,* 114 Pa. 547, 552, & Atl. 921, wherein the Supreme Court of Pennsylvania said: 'We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court which may and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the law-making power. It is a practice to be avoided and not followed. It has been condemned by many text-writers and by many courts. Occasionally it has been departed from, but the path is a devious and a dangerous one, which ought never to be trodden except upon considerations of the most convincing character and the gravest moment."

Construction—Legislative intent.

(b) But it may be claimed that manifest legislative intent may overrule positive language to the contrary. If so, at least by

one cardinal rule of construction the claim of intent to repeal, in this case, is in harmony with, rather than repugnant to, the express language of repeal found in Section 3.

> "If a later statute covers the whole subject of an earlier one, and contains no provision showing plainly that it was intended as a substitute for the other, it will operate as a repeal."
> *Elmer v. U. S.*, 45 Ct. Cl. 90.

And this is so "though it contains no words to that effect."

9 Am. Dig. Sub. "Statutes", Sec. 167, citing *State ex rel Gaston v. Shields*, 130 S. W. 298. *Freeman v. People*, (Ill.), 89 N. E. 667.

And this is so even if there is no repugnance.
People v. McCullough, 143 Ill. App. 112;
See 7 Am. Digest, Sub. "Statutes", Sec. 167.

> "A later statute complete in itself, and practically working independently of a former act on the same subject is not ordinarily deemed to be merely cumulative, but to operate as a repeal."
> *Rockingham County v. Chase*, (N. H.) 171 Atl. 634.

> "Where a later statute is exclusive, covering the whole subject matter to which it relates, it repeals by implication all prior statutes on that matter, whether they are general or special."
> *Hampton v. Hickey*, (Ark.) 114 S. W. 707.

> "A statute, which extends and enlarges a right granted before by a prior statute impliedly repeals the law by which the former was created or given. *Id.*
> "Where the later of two acts covers the whole subject-matter of the earlier one, not purporting to amend it, and plainly showing it was intended to be a substitute therefor, such later act will operate as a repeal of the earlier one, though the two are not repugnant." (Ga.) *Thornton v. State*, 63 S. E. 301.

To same effect see:
City of Buffalo v. Lewis, (N. Y.) 84 N. E. 809;
Milligan v. Arnold, (Ind.) 98 N. E. 822;
Pettiti v. State, 121 Pac. 278.

Repeal by Re-enactment.

(c) In *Murphy v. Utter*, 22 S. Ct. 776, 186 U. S. 95, 46 L. Ed. 1070, Justice Brown, for the court in approving *United States v. Tynen* 11 Wall. 88, 20 L. Ed. 153, said:

'It was held that the act of 1870 operated as a repeal of the act of 1813, and that all criminal proceedings taken under the former act failed; and that even where two acts are not, in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended to be a substitute for the first act, it will operate as a repeal of that act—citing a number of prior cases."

"When two statutes cover, in whole or in part the same subject matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court if possible will give effect to both. Where, however, a later act covers the whole subject matter of earlier acts and embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication it must appear that the subsequent statute covered the whole of the former one, and was intended as a substitute for it."

36 Cyc. 1077-8.

As supporting next to the last sentence the authorities are cited by states: Ala., Ark., Cal., Colo., D. C., Fla., Idaho, Ill., Ind., Ia., Kan., Ky., La., Me., Md., Mich., Minn., Miss., Mo.; Neb.; Nev., N. J., N. Y., Pa., Tex., Va., Wash., U. S. Can. Some 12 cases in U. S. S. C. The case for Iowa is *Diver v. Keokuk Sav. Bank*, 126 Ia. 691.

Even in a case in which the repealing statute was held unconstitutional, Dillon J., said, in *Childs v. Shower*, 18 Iowa, 272:

> "If the repealing clause was positive and unconditional and under circumstances which indicated a design to repeal the old law at all events, it would doubtless be operative, though contained in a statute which was unconstitutional."

But it must be admitted that there are some decisions including some in Iowa, which are difficult to reconcile with these authorities. *Allen v. City of Davenport*, 107 Ia., 90, is an illustration. But in none of this line of cases do we find that the courts recognize them to be in conflict with the rule announced in the above cited authorities. They are evidently understood by the courts to be distinguishable, and differ probably on the ground that in the statutes considered in the latter line of cases, there was inherent indubitable proof of the intention of the legislature to recognize as continuing in force, some rights or power created or conferred by the superseded statute.

In other words, the repealing statutes as a whole are not re-

garded as affecting complete and unqualified repeal. It may be claimed that those in this state may be affected by the provision in Sec. 48 of the Code to the effect that:

> "The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced under or by virtue of the statute repealed."

This language, however, will not bear such construction. If it required it, this would render such provision invalid.

> "All legislation enacted for the purpose of determining whether a statute operated to repeal prior legislation is void."
>
> 8 Cyc. 821, Citing
>
> *Ogden v. Witherspoon,* 18 Fed. Cas. No. 10461, 3 N. C. 227.

VI.

The provisions of the ordinance which are the basis for the prosecutions complained of are in excess of the authority delegated by the acts of the 34th and 35th General Assemblies in question. (Transcript pp. 5-6.)

In both acts the first section is a plain exercise of the state's legislative power by the general assembly, enacting for it that: "The emission of dense smoke within the corporate limits" of the cities designated, "is hereby declared to be a public nuisance."

Such declaration does not attempt, either by direct language or inference, to delegate any legislative authority. This is made doubly apparent by the language of so much of the title of these acts as relates to this section. The language is: "An act declaring the emission of smoke within the corporate limits of certain cities to be a public nuisance."

The attempted delegation of power is confined to the second, which, in the two acts, is identical. It reads:

> "Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance, either by fine or imprisonment, or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance."

If this language is effective, it authorizes the cities designated "to provide by ordinance" for three things: First, "the abatement

of such nuisances;" second, "all necessary rules and regulations for smoke inspection;" and third, "the abatement and prevention of the smoke nuisance." Neither by express language nor by any rule of implication or construction does this attempt to give such cities power to legislate by ordinance as to what shall constitute a nuisance; much less could it be claimed to grant the power to such cities to declare that to be a nuisance which is not a nuisance under any statute nor at common law.

See authorities cited under first proposition of this brief. Chief Justice Baldwin, in *Clarke, Dodge & Co. v. City of Davenport*, 14 Ia., 500, said:

> "It is a well settled rule of construction of grants by legislatures to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any doubt or ambiguity arising out of terms used by the legislature must be resolved in favor of the public. *Minturn v. Lame*, 23 How., 435."

Ordinance No. 1870, adopted by the City Council of the city of Des Moines following the passage of the act of the 34th G. A., evinces no consideration whatever of the authority conferred upon the city by the act. So far as its conception of such authority is concerned, it has acted precisely as might have been expected if the power exercised by the legislature in enacting the first section as the law of the state, had been delegated to the city. It attempted in Sec. 1 to substitute an entirely new and different definition of a nuisance from that adopted by the legislature in the first section of the statute. In sections 15 and 16 it attempted to fix an arbitrary test for the determination of the question of fact as to when smoke emitted is of the requisite density and duration to constitute the offense, and section 19 attempts to provide for licenses or exemptions from prosecution in certain cases.

It is too plain for argument that these several provisions taken together, attempt to substitute by ordinance a definition of the crime of nuisance committed by the emission of dense smoke, for the statutory definition given in the first section of the act of the legislature. It is evident that the legislature intended by the language employed in the first section, *ex proprio vigore*, to make the emission of dense smoke in the cities designated a nuisance. It is equally evident that it could not possibly have intended that it should constitute such nuisance without any reference to time, place, duration or circumstances, and without referene to the long established common law and statutory conceptions of what constitutes a nuisance, and, *a fortiori* it cannot be held to have intended to delegate to cities the power to so declare without reference to any of these considerations.

No lawyer can rise from a reading of the portion of the opinion

in *Tuttle v. Church*, 53 Fed., beginning on page 425, without feeling the force of this truth. The ordinance itself contains much evidence of unconscious recognition of it. The attempt to re-define a nuisance, and to arbitrarily fix the duration and degree of density of smoke emission is conclusive of this. If therefore, the legislature, in denouncing the emission of such smoke in such cities a nuisance, intended that this should be accepted by the courts in the light of the adjudications on the subject of nuisances, and that the courts should be aided in its enforcement by the well recognized and established principles of the law of nuisances, it must follow that it did not intend to delegate to such cities the power to adopt by-laws that would overthrow them, and impose upon the courts the duty of enforcing an ordinance which wholly ignores the nature and elements of nuisances, and the fact of nonexistence of them at the time of the trial, or even at the time complaint is filed. The offensive chimney, and buildings served by it, may have been wiped out of existence, and the nuisance forever completely abated, yet this ordinance, if upheld, will sustain fines and imprisonments for smoke emitted by it while in existence, and as well, decrees of abatement in suits subsequently brought.

The whole question of delegated authority might well have been foreclosed by a single suggestion: Could the City Council of the City of Des Moines, at the time it enacted Ordinance No. 1870, have enacted instead thereof a valid ordinance to the effect that the emission of dense smoke within the corporate limits of the City of Des Moines shall not be deemed a public nuisance? If it had now power to so declare by ordinance, then, by the same token, it had no power to declare it to be such nuisance under some circumstances and not under others; or, in other words, to define the conditions and circumstances under which it should be deemed a nuisance, particularly when it would not be under the facts and circumstances so declared, a nuisance in fact.

If the city could not take from the legislative enactment that "the emission of dense smoke is hereby declared to be a nuisance," it is self evident that it could not add to it.

The penal provisions of the ordinance are also in excess of the authority delegated, because the authority to inflict penalties is not limited or confined to its employment as a means of abating nuisances. These wholly ignore the nature of nuisances and do not attempt to deal with their maintenance as an offense. On the contrary, they simply seek to make each act of causing or suffering the emission of dense smoke for a few minutes in the aggregate in any one hour in some cases, and in a stated number of minutes in other cases, a misdemeanor. This provision is found in Sec. 16 of the Ordinance.

The act of the legislature is confined to a declaration in the first section that the emission of dense smoke is a nuisance. How any one could suppose that this conferred authority to declare that the emission of dense smoke in six non-consecutive minutes in any one hour from a smoke stack or chimney, or forty non-consecutive

seconds in five minutes from a locomotive engine, should be a misdemeanor, is somewhat difficult to perceive.

VII.

The features of the ordinance here involved are void for unreasonableness.

We do not regard this claim to be open to fair dispute. Not only do they attempt to declare that a nuisance which is not so in fact or law, but they attempt to provide a means of securing unrebuttable proof of the existence of the facts constituting what such features of the ordinance declare, contrary to law and fact, shall constitute such nuisance. Not only so, but the evidence so provided for is equally unrebuttable whether true or false. In short, the ordinance in this respect, places the question of fact as to the commission of the act which the ordinance erroneously declares to be a nuisance, wholly within the determination of the smoke inspector.

Under its provisions, no one could use smoke producing fuel in Des Moines, either for heat or power, except at the pleasure of the inspector. Government has not yet been able to provide a means by which public officials can be chosen who are good enough to be trusted with such power.

The second section of the act of the legislature attempted to confer as a power not theretofore existing, the authority to provide by ordinance that the cities in question should have a standing as a litigant in court in equitable actions for the abatement of such nuisances. So far from providing for the exercise of this privilege, the city council, by implication at least, provided in the ordinance that this should not be done, except "where the punishment by fine fails to abate the nuisance."

How can this be regarded by anyone as reasonable? Why did the city council thus attempt to confine the enforcement of the law and the ordinance to the harassment of repeated fines in the police court, where there can be neither change of venue nor jury, and where the amount involved in no single case would be sufficient to warrant appeals and expensive resistance?

Can there be any other reason for it than it was feared that the chancellor, in a cause in equity, would refuse to be bound by the hard, unreasonable, and oppressive features of the ordinance?

But it must be conceded, we think, that, if in such an action the court would refuse to be bound by the provisions of the ordinance, which attempt to arbitrarily determine the elements of a nuisance as created by the emission of dense smoke, it is because they are void for unreasonableness. It certainly cannot be claimed that they are sufficiently reasonable to be enforced as a penal ordinance, and, at the same time, so clearly unreasonable that a court of equity will not enforce them in a civil proceeding.

"Except where the corporation has a special charter power to enact the by-law or ordinance, the courts not only annul ordinances and by-laws because they contravene the higher laws, constitution and statutes, but they do not hesitate to declare them void and inoperative because they appear to the judicial mind, unreasonable and oppressive."

28 Cyc. 368, 9, Citing the cases by states, including from Iowa:

Davis v. Anita, 73 Ia., 325;
State Center v. Barrenstien, 66, Ia., 249;
Meyers v. Chicago etc. R. Co., 57 Ia., 555.

"Where the power to legislate upon a given subject is granted, and the mode of its exercise and the details of such legislation are not prescribed, the ordinance passed pursuant thereto must be a reasonable exercise of the power or it will be pronounced invalid. This the courts will do notwithstanding the unquestionable power of a legislative body to consider and decide upon the reason and justice of any proposed measures of legislation and even where the by-law has been indorsed on referendum; * * * and though it may not contravene constitution or statute and may be within the scope of charter powers, yet if they seem to the court oppressive, unfair, partial, or discriminating, they are declared unreasonable and void, whether this appear from their face or from proof *aliunde*. Although this often seriously disturbs the self-government of the municipality, it is a power too well established by a long line of concurring decisions to be doubted or challenged."

28 Cyc. 370.

"All ordinances must be reasonable, and not unreasonable as an interference with private legal rights or in restraint of trade; but whether a police ordinance is reasonable is not a question for the courts, when it is enacted in pursuance of express legislative authority, and although if obviously within implied power, every presumption is indulged in favor of its reasonableness; yet details of the ordinances, not mentioned in the statute of authority, may invalidate it; so also of the declaration of a thing to be a nuisance which is not so in fact."

Id. 763-4, Citing to last point *Munsell v. Carthage*, 105 Ill. App. 119;
Everett v Council Bluffs, 46 Ia., 66.

That ordinances must not be unreasonable interference with private legal rights, the text cites

Bush v. Dubuque, 69 Ia. 233;
Centerville v. Miller, 57 Ia., 56.

The case of *St. Louis v. Heitzberg Packing etc. Co.*, 141 Mo., 375, 42 S. W. 954, 64 Am. St. Rep. 516, 39 L. R. A. 551, appears to be a leading one on the question, and applies the rule to a prosecution arising under a smoke ordinance of the City of St. Louis, which provided in substance that the "emission into the open air of dense black or thick gray smoke within the corporate limits of the City of St. Louis is thereby declared to be a nuisance, and the owners, occupants, managers, or agents of any establishment, locomotives or premises from which dense black or thick gray smoke is emitted or discharged are made guilty of a misdemeanor and subject to a fine of not less than ten nor more than fifty dollars. And each and every day wherein such smoke shall be emitted shall constitute a separate offense." The city charter authorizes it to declare, prevent, and abate nuisances on public or private property, and the causes thereof. In a strong opinion the court quoted with approval the statement of Judge Dillon in his work on Municipal Corporations, as to such granted power, as follows:

> "Such powers, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation or use, is not such."

The opinion concludes with the following paragraph:

> "Now the ordinance itself would punish every housekeeper who kindled a fire to cook his or her morning meal, or to warm the house. Every replenishing of the furnace, whether in the heart of the business centers, or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception whatever is made as to time or quantity. When it is considered, and it must be by this court, that St. Louis has attained its growth in population and wealth in a large degree from the fact of its proximity to the great mines of bituminous coal which lie at its very door, and that this fuel has enabled it to become a great manufacturing city, and that this soft coal is peculiarly liable to produce this objectionable dense smoke, it seems to us that this ordinance which makes no reasonable allowance for the regulation of this smoke, but essays in advance of any known device for preventing it to punish all who produce it to any degree whatever, is wholly unreasonable. On the other hand, if, as learned counsel suggests, the ordinance is not enforced in all its strictness, but much is left to the discretion of the inspectors, then we have an unregulated official discretion which of itself renders the ordinance void, for it cannot be tolerated that the rights of a citizen in this state shall depend entirely upon the caprice of any official, high or low. All valid ordinances must fix the duty or liability of the citizen by certain intelligible

prescribed rules so that he may govern himself accordingly.

Our conclusion is, that while it is entirely competent for the city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health or annoying to the public at large, this ordinance must be held void because it exceeds the powers of the city under its charter to declare and abate nuisances and is wholly unreasonable."

VIII.

As stated, the unlawfulness of the emission of dense smoke is made so by virtue of the first section of the act, and not by virtue of the ordinance. There was no attempt to delegate the power to declare whether it should be unlawful or not. The legislature declared in the first act, under the enacting clause prescribed by the constitution, that such smoke "is hereby declared to be a public nuisance"; and in the second act, under the same enacting clause, that it is "hereby declared to be a nuisance." This probably would not, under either of the acts, render those responsible liable to prosecution under Sec. 5081 of Title 24, Chapter 14, which furnishes our general statutory definition of nuisances. This, for the reason that by its terms it is confined to "public or common nuisances as provided in this chapter, or at common law," while the titles to the acts of the 34th and 35th general assemblies do not make them a part of chapter 14 of Title 24, but makes them "Additional to Chapter 4, of Title 5 of the Code, relating to general powers of cities and towns."

But if such denunciation of smoke as a nuisance in the acts of the 34th and 35th general assemblies makes the act of maintenance a misdemeanor, then parties responsible therefor are subject to indictment and punishment under Section 4906 of the code, which provides:

> "Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any other statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding $500.00, or by both fine and imprisonment."

If this is so, the legislature could not, in addition thereto, delegate the power to the city to prescribe a double punishment for the same offense. It is true that some ordinances have been upheld which punish as offenses against the police power of cities, acts which are also made crimes against the laws of the state; but this is so only where they are such in fact, and not merely in name.

The earlier cases in this state are reviewed in *Town of Neola v. Reichart*, 131 Ia. 492, where this point is made very clear. No court has ever committed itself to the doctrine that cities can reenact the general criminal code of the state, and declare each offense defined therein a misdemeanor against the ordinance of the city.

In the *Neola* case it is said:

> "If such power is specifically conferred, the authorities agree that it may be exercised. The conflict arises in determining whether such authority is to be implied from statutes conferring general powers upon municipalities to enact such ordinances. This court is committed to the doctrine that if the subject of the ordinance is fairly within those powers conferred upon the town or city, the mere fact that the matter has been covered by statute will not invalidate the ordinance."

The first sentence of this language, quoted from the opinion by Ladd, J., is too broad. There is no case in Iowa and none in any other jurisdiction which has come under our notice, which announces such doctrine in all its breadth. It must be conceded from the mere statement of the proposition that an act which does not properly fall within the scope of the city's police power, cannot be brought within it by the mere circumstance that the legislature should afterwards have added it to the catalog of crimes against the laws of the state. Such circumstance could not change the nature of the act. It either does or does not fall within the scope of those limited powers properly delegated to cities, wholly independently of any question as to whether it is or is not a crime against the laws of the state.

In the case of *Iowa City v. McInnerny*, 114 Ia. 586, in the opinion of the court by Deemer, J., it was held that an ordinance was void which prohibited keeping a saloon open on election day. The question was whether the ordinance should be held to be in conflict with the statute because of the mere fact that the prohibitory and mulct law covered the entire subject comprehended by the ordinance. Justice Deemer said:

> "Surely, then, an ordinance covering a subject already fully covered by an act of legislature is in conflict therewith."

Justice Ladd does not criticize this, but claims that it should be construed in connection with previous construction by Justice Deemer, and that the case is distinguishable from the *Neola* case and from the pioneer case on the subject of *Bloomfield v. Trimble*, 54 Ia. 399. In that case there was no general discussion of the subject. The writer, Rothrock, J., contented himself with quoting the statement of the rule from Cooley's Constitutional Limitations, 198, as follows:

> "Indeed the same act may constitute an offense against both the state and the municipal corporation, and may be punished under both without the violation of any constitutional principle."

To this the writer of the opinion merely added: "The learned author states that such is the clear weight of authority."

This is not the question. Our contention is that the enactment by the legislature of a criminal statute neither adds to nor takes from the police power of the city, but that where, as in the *Iowa City* case, the legislature does prescribe full and complete legislation on any given subject, that circumstance is inconsistent with any supposed delegation of authority to municipalities to legislate on the same subject. This doctrine was re-asserted by Deemer, J., for the court in *Bear v. City of Cedar Rapids,* 141 Ia. 341. It was there applied to an ordinance which attempted to regulate traffic in mi to punish violations of the regulation by fine, and to exact licenses. He there said:

> "No implied power exists for the reason that the state itself has attempted to regulate the matter, and has provided for licensing the business. *Iowa City v. McInnerny,* 114 Ia. 586."

The decision is by a unanimous court. This shows determination to adhere to the doctrine, notwithstanding any difficulty that may be found in reconciling it to what was said by Justice Ladd in the *Neola* case.

Our contention on this point must be sound, because all will agree that the legislature could not directly prescribe two jeopardies, prosecutions and punishments, for the same offense; and it ought to be agreed by all that it cannot do so indirectly by itself prescribing a single jeopardy prosecution, and punishment, and then licensing some cities to prescribe a repetition thereof.

But there is still a clearer obstacle to the contention for constitutional validity. It presents a case of a partial direct exercise of the state's legislative power by the general assembly, coupled with an attempt to delegate to cities the power to complete its exercise. Concretely, and as so construed, it becomes a statute which, on behalf of the state, directly defines and prohibits an act as a crime, and at the same time attempts to delegate to certain cities the power to prescribe the punishment. This cannot be done.

Section 1 of that part of the constitution of the State of Iowa which is entitled "Legislative Department" next following "Article 3" thereof, is as follows:

> "The legislative authority of this state shall be vested in a General Assembly, which shall consist of a senate and house of representatives; and the style of each law shall be—
> *'Be it Enacted by the General Assembly of the State of Iowa.'"*

There are numerous cases in Iowa which consider legislative attempts to delegate this power. Some of these involve what might now be called referendum statutes. See

State v. Beneke, 9 Ia. 203;
Geebrick v. State, 52 Ia. 401;
State v. Weir, 33 Ia. 134;
Weir v. Cram, 37 Ia. 649.

Attempted delegation to courts:
Ford v. Des Moines, 80 Ia. 622.

Attempted delegation of its power to trustees:
State ex rel v. Mayor of Des Moines, 108 Ia. 36.

For good general illustration, see *Dowling v. Lancashire Ins. Co.*, (Wis.), 31 L. R. A. 112.

But it is said that legislative power may be delegated to municipal corporations within proper bounds.
State v. King, 37 Ia. 649.

As applied to municipalities, the rule is stated in Dillon on Municipal Corporations, 5th Ed., Vol. 2, Sec. 573, thus:

> "Although the proposition that the legislature of the state is alone competent to make laws is true, yet it is also settled that it is competent for the *legislature to delegate to municipal corporations the power to make by-laws and ordinances.*"

In an extended note to this text, appears the following:

> "But while the state may delegate to municipal authorities the power to enact ordinances under the police power, it cannot surrender or relinquish to a city the power to enact laws to punish *crimes or misdemeanors under general laws embracing all the people of the state.* This is so although the city may be created by or organized under a constitutional provision giving it the power to frame its own charter. *Keefe v. People*, 37 Colo. 317."
> (We do not find this case in the Pac. Rep.)

In 8 Cyc. page 830 the text says:

> "Generally, legislatures may delegate to cities and municipalities, legislative authority incident to municipal government."

The note cites the authorities by state, giving for Iowa; *Des Moines v. Hillis*, 55 Ia. 643.

It was probably within the power of the legislature to have declared the emission of dense smoke in all cities and towns of the state to be a public nuisance. Without so conceding this is here

suggested for sake of argument. If, in such a case, the power to fix the punishment could not be delegated to the city and town governments, it is difficult to perceive how the power can be rendered delegable by restricting the application of the law to one, or to a few only, of the larger cities.

The general rule as to delegation of power is stated in 8 Cyc. 831, thus:

> "While a legislative body cannot delegate the power to legislate, the legislature may delegate the power to determine some fact or state of things upon which a statute makes or intends to make its own action depend."

The cases denying the power of delegation are cited in Note 87. As applied to municipalities, the rule is stated on page 839, thus: "Generally legislatures may delegate to cities and municipalities legislative authority incident to municipal government."

The cases are cited in note 12.

This, we submit, is an accurate statement of the test or limitation on the power to delegate. It certainly cannot be claimed that the power to prescribe punishment for crimes against the laws of the state, is authority "incident to municipal government."

In the present case, the city cannot claim that the subject matter of the ordinance is not one for the direct exercise of the states legislative power; that is, a proper subject matter for state legislation. This, because the legislative so assumed and so exercised that power for the state in the very act upon which the city relies for its authority.

But there is still another constitutional obstacle to the contention of the prosecution, equally insurmountable. The mere statement of it dispenses with need of argument. *To hold otherwise would permit as many different punishments to be prescribed for the offense created by the statute, as there are cities to which the statute can apply.*

The legislature could not, by a direct exercise of its power under the constitution, have prescribed different punishments for the offense in each or any number of such cities. It could not delegate to such cities the power to do what it had no power to do. It could not accomplish indirectly what it had no power to legislate directly. Exactly this was held by the United States Circuit Court of Appeals, in an opinion filed by Sanborn, J., in *Robert J. Boyd Paving & Construction Co. v. Ward*, 85 Fed. 27. The discussion begins with the second paragraph on page 35, and ends on page 37 On this subject Judge Sanborn quotes from an opinion by Judge Canty of the Supreme Court of Minnesota, in *State v. Copeland*, 69 N. W. 27, a paragraph in which the latter said:

> "How can a law which goes into effect in one city and does not go into effect in another city of the same class, have a uniform operation throughout the state? It seems to us

that the legislature cannot bring about diverse charter powers in different cities by enacting any such local option law which may result in giving different cities different charter powers, unless the same result can be accomplished by a direct unconditional law. The mere possibility that all the cities of the class named may adopt the law will not save it. It must appear at the time the law is passed that it will take effect in all cities of the class, and that the class is a proper one. The uniform operation of the law cannot be left to any future contingency."

This constitutional requirement of uniformity is also violated by the first section of these acts of the 34th and 35th general assemblies. The classification of municipalities for the application of these acts is purely artificial, arbitrary, and fanciful. The first limited the power delegated to cities of 65,000 population or over. This of course meant Des Moines, and none other.

The 35th general assembly authorized us to point to it as authority for the assertion that there was no valid constitutional reason for limiting it to the City of Des Moines. It declared in the first section of Chapter 49 of its acts that cities of 30,000 and over organized under the general laws of the state, and all those of 16,000 and over organized under special charters, were equally eligible to such increase of power. If its bestowal is a beneficence, we should be enlightened as to the reason why it is withheld from cities organized under the general laws having a population between 16,000 and 30,000, and conferred upon all those having such population organized under special charters; and if its enforcement is inimical to industry and the general welfare of cities of between 16,000 and 30,000 population organized under the general statute, we should be told why cities of such population organized under special charters should be required to suffer the infliction.

In the case of *State v. Tower*, 84 S. W. 10, it is suggested that the legislature might find that the aggregate volume of smoke ordinarily attains the character of a public nuisance in the larger cities of a designated population and over; but it must be conceded that the aggregate volume of dense smoke emitted in a given city, and the amount of injury it may do, in other words whether it constitutes a nuisance or not, must depend more upon the character and location of its industries, the character and the residential location of its population, and of the fuel available, than upon the mere question of total population within its corporate limits.

In *State v. City of Orange*, (N. J.) 36 Atl. 706, the court considered an act of legislature providing for the consolidation of certain offices in cities of not less than 12,000 or more than 35,000 population, and said:

"No reason is perceived why cities having a population of over 12,000 and less than 35,000 should be empowered to

> consolidate any and all of their offices, which will not apply either to cities having a larger population than that specified, or else to cities having a small one. The act regulates the internal affairs of cities. It is special and local in its operation, and therefore unconstitutional and void. This being so, the ordinance brought here for review is also a nullity, and must be set aside."

The presence of the specified differing population of cities differing only in the character of the charter under which they may be organized, cannot possibly afford a basis for the legislative discretion in making the prescribed classification of the cities to which the act shall apply. As was said by the court of errors and appeals of New Jersey, in *Attorney General v. Mayor, etc. of Borough of Anglesea:*

> "I confess my inability to see how such a requirement can have any more to do with investing local electors with the power of municipal franchise, than if the fortuitous condition were that two hundred cattle must graze on the meadows, or two hundred pine trees stand in the forest. The classification adopted has no real basis. It is at best a mere figment; and the legislation founded thereon falls under the constitutional interdict, as construed by this court, viz., that distinctions that do not arise from substantial differences constitute no ground of support for legislation. *Hammer v. Richards,* 44 N. J. L. 657."

The enunciations of the general principle by the courts have been of too frequent occurence to leave occasion for their citation.

RESUME.

A consideration of the case may be aided by a brief recapitulation of the argument.

We think it should be conceded that two principal jurisdictional facts are established, namely,

(a) That the ordinance and proceedings had under it and the threatened repetition and continuation thereof, if illegal, are of such character that remedy by injunction will be awarded; and,

(b) That among the grounds for claim of invalidity there are questions arising under the constitution of the United States.

It is not necessary to the latter proposition that the complainants should be right as to their claim of unconstitutionality. It is only requisite that the case should in fact involve a substantial question arising under the constitution. This is merely said by way of reminder for purposes of further consideration for the language of the statute is so plain and the announcement of the rule by this court so frequent and recent that space for more on the subject is unjustified.

Granted that such questions are now presented to the court by the proper form of action for relief, in view of the facts alleged, the court will take the whole case and decide all of the questions which are involved and urged.

For further consideration of these we now suggest that we have shown beyond controversy that the defense must rest alone upon the act of the 34th general assembly as authority for the ordinance. That the second section of that act contains the only language by which the legislature attempted to delegate authority to the defendant city and that such language represents no legislative attempt to authorize provisions by ordinance under which the offensive proceedings have been had and are still threatened. Moreover that such act of the legislature is void for unconstitutionality because of its fictitious classification to which it applies and because the legislative authority it seeks to grant is nondelegable. Again such authority as was given to the city under that act was repealed in 1913 by the act of the 35th general assembly.

In all the literature on the subject, it is believed it will be difficult to find a better example for the application of the doctrine of unreasonableness than is presented by this ordinance. It represents a manifest effort to prevent judicial action on the merits of the fact question as to whether or not in any given case a smoke nuisance is being maintained, by means of the almost unlimited series of prosecutions that may be brought, and fines assessed, under the devices of this ordinance, for the operation of a furnace for only a few hours, or at most only a few days, and supported alone, without corroboration, on rebuttable evidence of the inspector. We use the term unrebuttable because for all practical purposes it is of that character, in actual experience. We are advised that there have been some two or three cases where peculiar and fortuitous circumstances enabled the defense to show that the inspector's evidence of his tests and observations of alleged smoke emissions was the result of amusing blunders, or utterly false, but in the main the defense is wholly at his mercy. He takes his observations and makes his alleged tests unobserved and without notice. He can, if his claim of authority is sustained, practically enforce total and complete prohibition of the use of the local bituminous coal in Des Moines for all purposes, not excluding heat for private residences, unless the consumers will remodel their furnaces and chimneys and adopt the alleged smoke prevention devices which may be dictated by his whims, hobbies, or cupidity, or by the same sort of motives and unregulated discretion of the smoke commission, appeal to which is the only remedy; and prospective builders of new furnaces and chimneys are included within such power, save the qualifications pointed out in the argument as to the discrimination between plants for the production of heat and power for manufacture and sale and those for production thereof for other purposes.

The ordinance plainly imposes the duty to exhaust the means of oppression by such successive prosecution, before resort shall

be had to authority attempted to be given in the act to bring suits in the name of the city for decrees in equity abating such nuisances. As an instrument of blackmail, corruption of the inspector and commissioners, for profit by concerns now publicly known to be engaged in the manufacture of so-called smoke consuming devices, it would be difficult to imagine a more choice instrument than this ordinance. Considered apart from the act of the legislature and without any question of its having exceeded the authority delegated its unconstitutionality as well as its unreasonableness for all the reasons shown in the several propositions argued appears so clear as to afford occasion for surprise that it could have commanded respectable defense.

It is only just to the learned trial judge who passed upon the question presented by the bill and motion in the court below, to say that did so at the close of a very busy term of court, when he was ill, practically without oral argument, and without having time to examine or consider the brief presented.

Respectfully submitted,

O. M. BROCKETT,

Solicitor for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 121

THE NORTHWESTERN LAUNDRY AND T. R. HAZARD,
Appellants,

vs.

THE CITY OF DES MOINES, IOWA, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT FOR APPELLEES.

Subject Index

Table of Cases

A. STATEMENT.

I. Nature of the Action.

This is a suit brought in the United States District Court for the Southern District of Iowa by The Northwestern Laundry and T. R. Hazard against the City of Des Moines, Iowa, and certain officers thereof charged with the enforcement of the law, all of the parties being residents of the State of Iowa, to have a certain ordinance of said city dealing with the smoke nuisance declared void, and to restrain the enforcement of the same by judicial proceedings or otherwise. (Tr. pp. 2-11.)

II. The Statute Authorizing the Ordinance.

The ordinance in question was passed September 6, 1911, pursuant to Chapter 37 of the Acts of the 34th General Assembly of Iowa, which was substantially re-enacted with slight changes as Chapter 49 of the Acts of the 35th General Assembly, both of which declared the emission of dense smoke in cities of a certain class to be a public nuisance and authorized such cities to provide by ordinance for the abatement of the same by criminal or civil proceedings, and also to provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance. (Tr. pp. 5, 6.)

III. The Smoke Ordinance.

The ordinance first declares the emission of dense smoke within the city to be a nuisance, then names those who shall be held responsible therefor, create. a Department of Smoke Inspection, with a Smoke Inspector as the head thereof, who must be qualified by training and experience in the theory and practice of smoke abatement and prevention and must also furnish a bond in the sum of $1,000.00 for the faithful performance of his duties. There is also created a Smoke Abatement Commission of five (5) members, at least one of whom shall have had experience in the installation and conduct of power and heating plants to act as advisors to the Smoke Inspector in the conduct of the department. The ordinance requires that plans of new plants and reconstructions of old ones affecting smoke prevention be submitted to the Smoke Inspector for approval, makes provision for an appeal to the Smoke Abatement Commission in case of disagreement over such plans and provides for the issuance of a certificate when such new or reconstructed plant is so constructed as to do the work required without emitting dense smoke in violation of the ordinance. The ordinance also provides for the punishment of the Smoke Inspector for any favoritism or misbehavior in office for his prompt suspension upon any such charge being made, and for removal from office upon conviction.

The ordinance provides for the determination of the density of smoke by means of the well known Reigelman's Smoke Chart as published and used by the United States Geological Survey, and for a fine for causing or permitting the emission of smoke of a certain degree of density for a certain length of time. (Tr. pp. 11-16.)

IV. The Decision of the Court.

The defendants filed a motion to dismiss the bill of complaint because it failed to show that the complainants were entitled to the relief sought, it showed on its face that the complainants had a plain, speedy and adequate remedy at law, and the court was without jurisdiction; which motion the court sustained, and a decree was entered dismissing the bill and the case. (Tr. pp. 16, 17, 20.)

B. BRIEF.

I.

The Court Was Without Jurisdiction.

1. *A Federal Court cannot issue an injunction to restrain judicial proceedings in a state court, except in bankruptcy matters.*

U. S. Rev. Stats., Sec. 720, 4 Fed. St. Ann. 509;
Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345;
Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644;
Ex Parte Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402.

2. *A court of equity cannot issue an injunction to restrain the enforcement of a criminal ordinance, at least without a showing of irreparable injury, there being a plain, speedy and adequate remedy at law.*

U. S. Rev. Stats., Sec. 723, 4 Fed. St. Ann. 530;
Ex Parte Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402;
Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. Rep. 119, 43 L. Ed. 399;
Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. Ed. 535;
Davis and Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. Ed. 778;
Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511; 22 Cyc. 903.

II.

Decisions of State Courts Must be Followed.

In construing and interpreting the statute and ordinance, and in determining their validity under the state constitution and stat-

utes, this court must follow the decisions of the highest court of the state.

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. Rep. 423, 45 L. Ed. 618;
Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. Rep. 594, 45 L. Ed. 820;
Yazoo, etc. R. Co. v. Adams, 181 U. S. 580, 121 Sup. Ct. Rep. 240, 45 L. Ed. 395;
Robinson & Co. v. Belt, 187 U. S. 41. 23 Sup. Ct. Rep. 16, 47 Law Ed. 65;
Manley v. Park, 187 U. S. 547, 23 Sup. Ct. Rep. 208, 47 Law Ed. 296;
Whitmier, etc. Co. v. Buffalo, 118 Fed. 773;
12 Cyc. 898, citing many other cases.

III.

There Was Valid Statutory Authority for the Ordinance.

34th Iowa G. A., Chap. 37:
35th Iowa G. A., Chap. 49, now 1913 Supplement to Iowa Code, Sections 713-a, 713-c.

1. *The emission of dense smoke in populous cities is a proper subject of police regulation as a public nuisance.*

Moses v. United States, 16 App. D. C. 428, 50 L. R. A. 532;
Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698;
Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097;
People v. Lewis, 86 Mich. 273, 49 N. W. 140;
St. Paul v. Haugbro, 93 Minn. 59, 100 N. W. 470;
State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402;
Rochester v. Macauley-Fien Milling Co., 199 N. Y. 207, 92 N. E. 64, 32 L. R. A. (N. S.) 554;
See also *McGill v. Pintsh Compressing Co.*, 140 Iowa, 429, 118 N. W. 786.

2. *The repeal and simultaneous re-enactment of substantially the same provisions is to be construed and considered as a continuation of the prior statute, subject to the modifications, and the binding force and effect thereof is not destroyed or interrupted thereby.*

Hancock v. District Twp. of Perry, 78 Iowa, 550, 43 N. W. 527;
State v. Prouty, 115 Iowa, 657, 84 N. W. 670;
Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532;
Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350.

3. *The delegation to cities of the power to regulate the emission of dense smoke within their limits is proper, valid and constitutional.*

State v. King, 37 Iowa, 462;
Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756;
Des Moines v. Hillis, 55 Iowa, 643, 8 N. W. 638;
State ex rel. v. Mayor of Des Moines, Iowa, 103 Iowa, 76, 72;
Fairfield v. Shallenberger, 135 Iowa, 615, 113 N. W. 459; 11 Cyc. 693.

4. *The classification of cities affected according to population is reasonable, valid and constitutional.*

Bowman v. Lewis, 101 U. S. 22, 25 L. Ed. 989;
Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. Rep. 350, 30 Law Ed. 578;
Haskel v. Burlington, 30 Iowa, 232;
Owen v. Sicux City, 91 Iowa, 190, 59 N. W. 3;
Ulbrecht v. Keokuk, 124 Iowa, 1, 97 N. W. 1082;
Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177;
State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402.

5. *The statute is uniform in its operation within the meaning of the Constitution of Iowa, Art. 1, Sec. 6.*

Haskel v. Burlington, 30 Iowa, 232;
Owen v. Sioux City, 91 Iowa, 190, 59 N. W. 3;
Fairfield v. Shallenberger, 135 Iowa, 615, 113 N. W. 459;
Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177.

6. *The legislature did not authorize double punishment for the same offense, but it could have authorized municipalities to punish an offense also punishable under the state law.*

Bloomfield v. Trimble, 54 Iowa, 399, 6 N. W. 586;
Avoca v. Heller, 129 Iowa, 227, 105 N. W. 444;
Blodgett v. McVey, 131 Iowa, 552, 108 N. W. 239;
Neola v. Reichart, 131 Iowa, 492, 109 N. W. 5;
2 Dillon on Municipal Corporations, Sections 630-633;
Fox v. Ohio, 5 How. 410, 12 L. Ed. 213;
United States v. Marigold, 9 How. 560, 13 L. Ed. 257;
Moore v. Illinois, 14 How. 13, 14 Law Ed. 306.

IV.

The Ordinance is Reasonable, Valid and Constitutional.

1. *The ordinance is fairly within the authority conferred upon the city by the statute, under the rule that the city may exercise such powers as are inherent in it and such as are expressly or impliedly conferred upon it, including those necessary or incidental to the carrying into effect of its express powers, regard always being had to the intention of the legislature.*

Davenport v. Kelly, 7 Iowa, 102;

Mullarky v. Cedar Falls, 19 Iowa, 21;
Dubuque v. Stout, 32 Iowa, 47, 80;
State v. Holcomb, 68 Iowa, 107, 26 N. W. 33;
Wood v. Farmer, 69 Iowa, 533, 29 N. W. 440;
District Twp. v. Rankin, 70 Iowa, 65, 29 N. W. 806;
Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070.

2. *The classification of plants in the ordinance is reasonable and valid, and there is no unjust discrimination.*

Moses v. United States, 16 App. D. C. 428, 50 L. R. A. 532;
Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097;
Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698;
People v. Lewis, 86 Mich. 273, 49 N. W. 140;
State v. C. M. & St. P. R. Co., 114 Minn. 122, 130 N. W. 545, 33 L. R. A. (N. S.) 494;
State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402;
Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923.

3. *The ordinance is not unreasonable and void as vesting arbitrary and unregulated discretion in the Smoke Inspector and Smoke Abatement Commission.*

Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914;
Western Union Tel. Co. v. Richmond, 224 U. S. 160, 56 L. Ed. 710;
Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. Rep. 731, 42 L. Ed. 71;
Grundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. Ed. 725;
Fisher v. St. Louis, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. Ed. 1018.

4. *The provision for the use of Reigelman's Smoke Chart is reasonable and valid.*

Rochester v. Macauley-Fien Milling Co., 199 N. Y. 207, 92 N. E. 641, 32 L. R. A. (N. S.) 554;
Cincinnati v. Burkhardt, 30 Ohio C. C. 350.

5. *There is no violation of the constitutional provisions respecting excessive fines and unusual punishments.*

Pervear v. Massachusetts, 5 Wall. 475, 18 L. Ed. 608;
2 Dillon on Municipal Corporations, (5th Ed.) Sec. 646;
State v. Botkin, 71 Iowa, 87, 32 N. W. 185;
Hooper v. California, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. Ed. 297.

V.

The Ordinance is Presumed to be Valid and Should be Upheld if Possible.

1. *The ordinance is presumed to be reasonable and valid, the party attacking it has the burden of showing invalidity, and any doubt should be resolved in favor of its validity.*

State v. Holcomb, 68 Iowa, 107, 26 N. W. 33;
Snouffer v. Cedar Rapids & M. R. Co., 118 Iowa, 287, 92 N. W. 79;
McGuire v. C. B. & Q. R. Co., 131 Iowa, 340, 108 N. W. 902;
Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914;
2 Dillon on Municipal Corporations, (5th Ed.), Sec. 649;
2 McQuillon on Municipal Corporations, Sec. 974;
21 Am. & Eng. Enc. Law, (2nd Ed.), 978.

2. *An Ordinance should not be held unreasonable or invalid as a violation of the constitution or otherwise unless such invalidity is clearly and unmistakably made to appear.*

Fletcher v. Peck, 6 Cranch 87, 3 L. Ed. 162;
Livingston County v. Darlington, 101 U. S. 407, 25 L. Ed. 1015;
Nichol v. Ames, 173 U. S. 509, 19 Sup. Ct. Rep. 522, 43 L. Ed. 786.

C. ARGUMENT.

I. The Court Was Without Jurisdiction.

A careful consideration of this case will, we believe, lead the court to the conclusion that the court below rightly dismissed the bill of complaint for the reason that it had no jurisdiction to grant the relief asked.

1. *A Federal Court cannot issue an injunction to restrain judicial proceedings in a state court, except in bankruptcy matters.*

It is unnecessary to remind this honorable court that a Federal court cannot and will not grant an injunction to restrain judicial proceedings in a state court, and yet that is exactly what the complainants sought to have the court do. Their prayer for relief was in part as follows:

> "That they and each of them and their successors in office be temporarily and permanently restrained and enjoined from any attempt to cause to be instituted or prosecuted any judicial proceedings whatever, provided for in said ordinance, or to procure to be rendered any judgment of any character whatever for the violation of any of the

provisions thereof, and from attempting in any manner whatsoever to enforce any of the provisions of the same, or to claim any right, power or authority whatever by reason thereof;"

Section 720 of the United States Revised Statutes provides that:—

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

See also the following cases:

Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345;
Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644;
Ex Parte Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402.

2. *A court of equity cannot issue an injunction to restrain the enforcement of a criminal ordinance, at least without a showing of irreparable injury, there being a plain, speedy and adequate remedy at law.*

It is a familiar rule that a court of equity will not enjoin the enforcement of a criminal ordinance, at least without a showing of irreparable injury, and the complainants have not shown that they will suffer any irreparable injury. A mere allegation of the legal conclusion that they will suffer irreparable injury will not take the place of a showing of the facts constituting such irreparable injury.

In *Harkrader v. Wadley*, 172 U. S. 148, 170, 19 Sup. Ct. Rep. 119, 43 L. Ed. 399, 405, this court said:

> "We are of opinion, then, that a court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused."

See also the following authorities:

U. S. Rev. Stats., Section 723, 4 Fed. St. Ann. 530;
Ex Parte Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402;
Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. Ed. 535;
Davis and Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. Ed. 778;
Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511; 22 Cyc. 903.

II. Decisions of State Courts Must be Followed.

In construing and interpreting the statute and ordinance, and in determining their validity under the state constitution and statutes, this court must follow the decisions of the highest court of the state.

We do not think any comment upon the above proposition is necessary. The cases cited in the brief fully support it.

III. There Was Valid Statutory Authority for the Ordinance.

Chapter 37 of the 34th Iowa General Assembly provided as follows:

> "Section 1. *Declared a nuisance.* The emission of dense smoke within the corporate limits of any of the cities of this state now or hereafter having a population of sixty-five thousand (65,000) inhabitants or over, including cities acting under the commission plan of government is hereby declared to be public nuisance.
>
> "Section 2. *Abatement.* Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance."

The above statute was repealed and re-enacted as Chapter 49 of the Acts of the 35th Iowa General Assembly, which provides as follows:

> "Section 1. *Declared a nuisance.* The emission of dense smoke within the corporate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter now or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance.
>
> "Sec. 2. *Abatement.* Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both; such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance.
>
> "Sec. 3. *Repeal.* That chapter thirty-seven (37) of the laws of the Thirty-fourth General Assembly be and the same is hereby repealed."

1. *The emission of dense smoke in populous cities is a proper subject of police regulation as a public nuisance.*

That the emission of dense smoke in populous cities is subject to police regulation as a public nuisance has been decided so many times by courts all over the country, that we merely refer your Honors to a few cases upon the subject. It is detrimental to the health and the general welfare of the people, and should be regulated in large cities, especially where, as in Des Moines, much soft or bituminous coal is used.

Moses v. United States, 16 App. D. C. 428, 50 L. R. A. 532;
Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698;
Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097;
People v. Lewis, 86 Mich. 273, 49 N. W. 140;
St. Paul v. Haugbro, 93 Minn. 59, 100 N. W. 470;
State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402;
Rochester v. Macauley-Fien Milling Co., 199 N. Y. 207, 92 N. E. 64, 32 L. R. A. (N. S.) 554.

See also

McGill v. Pintsh Compressing Co., 140 Iowa, 429, 118 N. W. 786.

2. *The repeal and simultaneous re-enactment of substantially the same provisions is to be construed and considered as a continuation of the prior statute, subject to the modifications, and the binding force and effect thereof is not destroyed or interrupted thereby.*

This question is governed by the decisions of the Iowa Supreme Court, and there can be no doubt under the decisions cited in our brief, that there was no interruption of the binding force of the statute under which the ordinance in question was passed.

In *State v. Prouty*, 115 Iowa, 657, 84 N. W. 670, 671, the Supreme Court of Iowa said:

> "The repeal and simultaneous re-enactment of substantially the same statutory provisions is not to be construed as an implied repeal of the original statute, but as a continuation thereof, so that all interests, under the original statute, remain unimpaired. *Hancock v. Perry Tp.*, 78 Iowa, 555, 43 N. W. 527; *Association v. Benshimol*, 130 Mass. 327; *Fullerton v. Spring*, 3 Wis. 667; *Wright v. Oakley*, 5 Metc. (Mass.) 400; *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805. The same rule applies to general revisions of existing laws that are substantially re-enacted. *Scheftels v. Tabert*, 46 Wis. 439, 1 N. W. 156. And also to criminal statutes. *State v. Wish*, 15 Neb. 448, 19 N. W. 686; *State v. Gumber*, 37 Wis. 298. In practical operation and effect, the new statutes are to be considered as a continuance and modification of old laws, rather than as an abrogation of the old and the re-enactment of new ones. See, also, *Pratt v. Commissioners*, 139 Mass. 563, 2 N. E. 675; *State v.*

Bemis, (Neb.) 64 N. W. 350; *Sternberg v. State,* (Neb.) 69 N. W. 851; *State v. Kibling,* 63 Vt. 643, 22 Atl. 613; *Anding v. Levy,* 57 Miss. 58."

3. *The delegation to cities of the power to regulate the emission of dense smoke within their limits is proper, valid and constitutional.*

We do not understand why this question was raised, as the rule is well settled both in Iowa and elsewhere in this country that the state may lawfully delegate to municipal corporations the exercise of its police power within their limits. This practice has been frequently upheld in the cases cited in our brief.

4. *The classification of cities affected according to population is reasonable, valid and constitutional.*

Since the emission of dense smoke must naturally increase in proportion to the population of a city, and the discomforts and harm arising therefrom correspondingly increase, it is proper to fix a certain standard of population as a basis for regulation of the smoke nuisance.

The legislature has exercised its discretion in fixing that standard and it is not for the courts to substitute their judgment for that of the legislature. Special Charter cities as they exist in Iowa constitute a special class, as is shown by the cases cited in our brief.

5. *The statute is uniform in its operation within the meaning of Constitution of Iowa, Art. 1, Sec. 6.*

The Iowa cases cited in our brief show clearly that there is no validity to the objection that the statute is not uniform in its operation.

6. *The legislature did not authorize double punishment for the same offense, but it could have authorized municipalities to punish an offense also punishable under the state law.*

We do not believe that the statute made the emission of dense smoke a misdemeanor and hence it could not be punished as such. Even if it had, the cases we have cited in our brief show conclusively that there is no constitutional objection on that ground.

IV.

The Ordinance is Reasonable, Valid and Constitutional.

1. *The ordinance is fairly within the authority conferred upon the city by the statute, under the rule that the city may exercise such powers as are inherent in it and such as are expressly or impliedly conferred upon it, including those necessary or incidental to the carrying into effect of its express powers, regard always being had to the intention of the legislature.*

We think that the ordinance comes fairly within the authority conferred by the statute. The city was expressly authorized to:

(a) Abate the smoke nuisance by fine or imprisonment, and by action in the district court.

(b) Provide necessary rules and regulations for smoke inspection.

(c) Provide necessary rules and regulations for the abatement of the smoke nuisance.

(d) Provide necessary rules and regulations for the prevention of the smoke nuisance.

In addition it possessed all such powers as were necessary or incidental to the carrying into effect of the above powers.

2. *The classification of plants in the ordinance is reasonable and valid, and there is no unjust discrimination.*

In *Moses v. United States*, 16 App. D. C. 428, 50 L. R. A. 532, it was held that an exemption of private residences from a statute prohibiting the emission of dense smoke was not unreasonable or unlawful.

In *State v. C. M. & St. P. R. Co.*, 114 Minn. 122, 130 N. W. 545, 33 L. R. A. (N. S.) 494, it was held that an ordinance for the prevention of dense smoke which applied only to railroad yard or switch engines was reasonable and valid.

In *State v. Tower*, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402, it was held that an exemption of locomotive engines and steamboats from the operation of a smoke ordinance did not render it invalid.

See also *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, and other cases cited in brief.

3. *The ordinance is not unreasonable and void as vesting arbitrary and unregulated discretion in the Smoke Inspector and Smoke Abatement Commission.*

We will only quote from two cases on this proposition but the other cases cited in our brief are also directly in point and uphold the above statement.

In *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, the Supreme Court of Iowa in passing upon the validity of the Iowa Hotel Inspection Law said:

> "It is next argued that the act in question confers upon the hotel inspector legislative powers. This contention is based upon certain general provisions contained in the statute which call for the exercise of judgment on the part of the hotel inspector. By its terms such act is not applicable to hotels of 'approved fireproof construction.' *It is argued that this expression is not known to the trade, and therefore that it can mean nothing except that the hotel inspector may arbitrarily approve or disapprove a given hotel as being of 'fireprooof construction' or otherwise.* The act also provides that 'approved sanitary conditions' shall be maintained, and that cesspools and privies shall be properly cleaned and disinfected as often as necessary to maintain them in such sanitary condition. *It is argued that the inspector may arbitrarily determine whether a hotel is thus maintained in a sanitary condition or not, and that the statute contains no definition which will protect the hotel keeper against such*

arbitrary conduct. Other analogous provisions of the act are presented to our attention which provide opportunities, as is claimed, to the inspector to act arbitrarily and oppressively. It may be noted first that these very provisions which are thus arrayed as fatal defects in the law were manifestly intended to give the law flexibility and to make it less technical and less onerous to the hotel keeper. The ultimate purpose and final object of the law is clearly set forth. This object may be attained by the hotel keeper by the specific methods pointed out in the statute, or by such other methods as the hotel keeper may choose, provided he attain the result. The fallacy in the argument at this point is the assumption that the hotel inspector may arbitrarily, in a given case, find the facts to be otherwise than as they truly are. The inspector is himself amenable to the law and can proceed only under the law and in accordance with the facts as they shall be. The power of the inspector in such a case has been set forth by the Supreme Court of Massachusetts in this wise: 'The power to make rules and regulations in the nature of subsidiary legislation may be delegated by the legislature to a local board or commission; such rules being subject to be tested in the courts to determine whether they reasonably are directed to the accomplishment of the lawful purpose of the statute under which they were made.' *Welch v. Swasey,* 193 Mass. 364, 79 N. E. 745, 118 Am. State Rep. 523, 23 L. R. A. (N. S.) 1160.

The act under consideration does not purport to confer upon the inspector any arbitrary power. It does require him to determine in given cases whether a hotel is of 'fireproof construction.' If 'yea,' it is an approved construction within the meaning of the statute. If 'nay,' then otherwise. *But this would not empower the inspector to say arbitrarily, that a given hotel was not of 'fireproof construction' when in truth it was of such fireproof construction. Nor have we any doubt that such an attempted act on the part of the inspector could be called in question by any aggrieved party by proper action in court.* And the same may be said concerning the other analogous features of the act which we have already referred to."

In *Western Union Telegraph Co. v. Richmond,* 224 U. S. 160, 56 L. Ed. 710, this court was called upon to pass upon the validity of an ordinance conferring certain powers upon the City Engineer and other officials in regard to the location and manner of construction of telephone and telegraph poles, wires and conduits, which was claimed to vest arbitrary discretion in them. We quote as follows from the opinion in that case:

"By Sec. 1 poles and wires are not to be put up 'until the city engineer shall have first determined the size, quality,

character, number, location, condition, appearance, and manner of erection of' the same. By Sec. 4 the committee on streets may require permission to be given to others to place upon the poles light current wires which, in the Committee's opinion, will not unreasonably interfere with the owners' business; terms, if not agreed upon, to be submitted to arbitration. By Sec. 15 the chief of the fire department and the superintendent of fire alarm and police telegraph are to inspect poles and wires, and if a pole is unsafe, or the attachments or insulations, etc., are unsuitable or unsafe, are to require them to be altered or replaced and removed, with a fine for each day's failure to obey the order. By Sec. 26 violation of any provision, or failure to obey any requirement made under the ordinance by the city engineer or the just-named superintendent or chief, if not specially fined, is to be fined from ten to five hundred dollars a day, by the police justice. Finally, by Sec. 28, as amended in 1903, all overhead wires within a certain territory are to be removed, and within two months plans for conduits are to be submitted to the committee on streets and Shockee creek, showing location, plan, size, construction, and material. These plans may be altered or amended by the committee, and when satisfactory to it are to be followed by the owner of the wires in a manner satisfactory to the city engineer. The pavements are to be replaced and kept in repair to his satisfaction and the city saved harmless from damages. The conduits are to provide for an increase of 30 per cent, not to be occupied by third parties without consent of the committee and compensation, but the wires of the city to be carried free, one duct being reserved for them. The location, size, shape and subdivision of the conduits, the material and manner of construction, must be satisfactory to the city engineer, and the work of laying underground conduits is to be under the direction and to the satisfaction of the superintendent of fire alarm and police telegraph.

"All these provisions are objected to as subjecting the appellant to an arbitrary discretion,—in Sec. 1, that of the city engineer as to the poles; in Sec. 4, that of the committee on streets as to the use of the poles; in Sec. 15, that of the chief and superintendent mentioned as to not only the safety of the poles and wires, but the unsuitableness of the latter, or their attachments, insulation, or appliances; in Sec. 28, that of the committee on streets as to underground plans, that of the superintendent of fire alarm as to laying the conduits, and that of the city engineer as to the replacement of pavement in the streets, and the carrying out of the plans in all the details just stated. It is argued also that by Sec. 26 the appellant is subjected to further requirements without limit from the officers named, but this argument may be dismissed, the requirements referred to being only those 'made under

this chapter;' that is, specifically authorized in the other sections to which we have referred. Again, the objections are not to be fortified by those decisions that turn on the power to delegate legislative functions. *United States v. Grimaud*, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480. We have been shown no ground for supposing that the ordinance exceeded the power of the legislature to authorize, or of the city to enact, unless it interferes with some special paramount right of the appellant. The bill is brought wholly on the ground that the appellant has such rights that no state legislation can touch. Unless it has them, there is nothing in the Constitution of the United States to prevent the grant of these discretionary powers to the committees and officers named. *Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71, 17 Sup. Ct. Rep. 731; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. Rep. 633; *Fisher v. St. Louis*, 194 U. S. 361, 371, 48 L. Ed. 1018, 1023, 24 Sup. Ct. Rep. 673; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 225, 53 L. Ed. 150, 158, 29 Sup. Ct. Rep. 67.

"The Appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. To begin with the end, while it is true that rules are not laid down in terms, they are implied so far as there is need to be any. If the committee and officers do their duty, there is no room in the question left to them for arbitrary whim. They are to exercise their judgment on the suitableness, safety, etc., of the places, poles, and wires by the criteria that would be applied by all persons skilled in such affairs who should seek to reconcile the welfare of the public and the instalment of the plant. The objection that other motives may come in is merely that which may be made to all authority,—that it may be dishonest,—an objection that would make government impossible if it prevailed. It is said that the ordinance should confine the committee and officers to finding whether required and specified facts exist. But not only is it impossible to set down beforehand every particular fact that may have to be taken into account, but, in case of dishonesty, it would do no good. We are of opinion that the ordinance is not unreasonable as a grant of arbitrary power. Regulations very like these were upheld, so far as they presented Federal questions, against a company assumed to have a right to use the streets, in *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U. S. 78, 99, 42 L. Ed. 955, 964, 18 Sup. Ct. Rep. 505. See also *Wilson v. Eureka City*, 173 U. S. 32, 43 L. Ed. 603, 19 Sup. Ct. Rep. 317."

We regard the above cases as conclusive on this proposition.

We would also point out some of the safeguards thrown about the exercise of the powers conferred on the Smoke Inspector and Smoke Abatement Commission.

(a) The Smoke Inspector must be qualified by training and experience in the theory and practice of Smoke prevention.

(b) The Smoke Inspector must give a bond in the sum of $1000.00 for the faithful performance of his duties.

(c) The Smoke Inspector is given the benefit of the advice and counsel of the Smoke Abatement Commission.

(d) The Smoke Abatement Commission consists of five (5) members appointed by the City Council, at least one of whom must have had experience in the installation and conduct of power and heating plants.

(e) There is an appeal from the Smoke Inspector to the Smoke Abatement Commission in case of disagreement over the plans for new reconstructed plants.

(f) Under the ruling in the case of *Hubbell v. Higgins*, resort could be had to the courts for relief in case of abuse of the powers vested in the Smoke Inspector and Smoke Abatement Commission.

(g) The Smoke Inspector is required to keep a complete record in his office of all plans submitted, permits issued, communications and written advice from the commission, and other matters.

(h) The Smoke Inspector is to be promptly suspended upon any charge of favoritism or neglect of duty, being made against him, and must be promptly discharged upon conviction thereof.

4. *The provision for the use of Reigelman's Smoke Chart is reasonable and valid.*

The statute authorized the city to make rules and regulations for smoke inspection and the prevention and abatement thereof. It is manifest that it is desirable to have some fixed standard to go by in determining whether smoke is so dense as to be a public nuisance, and the use of Reigelman's Smoke Chart for the purpose of testing its density solves many difficulties in the practical enforcement of the ordinance.

In *Rochester v. Macauley-Fien Milling Co.*, 199 N. Y. 207, 92 N. E. 641, 32 L. R. A. (N. S.) 554, it was held that:

> "An ordinance forbidding stationary stacks in a city to emit smoke for more than five minutes at a time once in four consecutive hours, except between the hours of 5 and 7:30 A. M., which is darker than a scale prepared by covering a dead white surface with dead black lines one twenty-fourth of an inch in width drawn at right angles one-fourth of an inch from centers and viewed from a distance of not less than 100 feet in the open air, is not unreasonable as matter of law."

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5. *There is no violation of the constitutional provisions respecting excessive fines and unusual punishments.*

The cases cited by appellants do not establish the invalidity of the ordinance on this ground. The ordinance would probably be construed as only permitting the charging of one offense for each day's violation, and surely it cannot be said that the fine provided is so exorbitant as to invalidate the ordinance.

The cases we have cited in our brief hold that if a construction can be placed upon an ordinance whereby it may be held valid it should be so construed. We would further suggest that appellants are in no position to complain of this part of the ordinance until they suffer some actual or threatened injury therefrom.

V.

The Ordinance is Presumed to be Valid, and Should be Upheld if Possible.

1. *The ordinance is presumed to be reasonable and valid, the party attacking it has the burden of showing invalidity, and any doubt should be resolved in favor of its validity.*

This is such a well known rule that we will merely refer the court to the authorities cited in our brief, all of which uphold the above proposition.

2. *An ordinance should not be held unreasonable or invalid as a violation of the constitution or otherwise unless such invalidity is clearly and unmistakably made to appear.*

We believe that it is the duty of this court to uphold even a city ordinance if it is possible to do so, and that it should not be held invalid unless its invalidity is clearly shown beyond any reasonable doubt.

Respectfully submitted,

H. W. BYERS,
ESKIL C. CARLSON,
EARL M. STEER,
Solicitors for Appellees.

NORTHWESTERN LAUNDRY *v.* CITY OF DES MOINES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 121. Argued December 9, 1915.—Decided January 10, 1916.

Where the decree of the District Court is a general one, and there is no attempt to make separate issue on the question of jurisdiction, but the constitutional question is the basis of appeal to this court, the appeal brings up the whole case.

Where no state statute is shown giving an adequate remedy at law to one endeavoring to enjoin enforcement of an ordinance, this court must deal with the questions both state and Federal as they appear on the face of the bill.

A State may, by direct legislation or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and restrain it; and regulations to that effect, if not arbitrary, are not unconstitutional under the due process clause of the Fourteenth Amendment even though they affect the use of property or subject the owner to expense in complying with their terms.

Whether a statute, which repeals a former statute but reënacts the identical matter, affects the validity of ordinances established under the earlier statute, is a state matter.

The state courts not having passed upon the question of whether the ordinance involved in this case is in excess of the legislative grant, this court finds that it is not, and also finds that the Smoke Abatement Ordinance of Des Moines, Iowa, is not invalid under the state statute.

An ordinance, otherwise valid, which applies equally to all coming within its terms is not unconstitutional as denying equal protection of the law if there is reasonable basis for the classification, even though other businesses not affected might have been included within its scope.

The fact that a state police statute includes certain municipalities and omits others does not render it unconstitutional as denying equal protection of the law.

The Des Moines Smoke Abatement Ordinance is not unconstitutional

under the due process or equal protection provision of the Fourteenth Amendment; nor is it in excess of the powers of the city under the existing statutes of the State of Iowa.

THE facts, which involve the constitutionality, under the due process and equal protection provisions of the Fourteenth Amendment, and also the validity under the state laws and Constitution, of the Smoke Abatement Ordinance of the City of Des Moines, Iowa, are stated in the opinion.

Mr. O. M. Brockett, for appellant, submitted:

Injunction lies to restrain enforcement of invalid municipal ordinances, the execution of which injuriously affects private rights. *Deems* v. *Baltimore*, 80 Maryland, 164; *Mobile* v. *Louisville R. R.*, 84 Alabama, 115; *Stevens* v. *St. Mary's School*, 143 Illinois, 336; *Austin* v. *Cemetery Assn.*, 87 Texas, 330; *Bear* v. *Cedar Rapids*, 147 Iowa, 341.

It is a violation of the Fourteenth Amendment to vest in any officer or body of officers wholly arbitrary and unregulated discretion to grant or withhold licenses to hold and enjoy the natural and lawful rights of property and occupation, as is attempted by provisions of the ordinance complained of. *Yick Wo.* v. *Hopkins*, 118 U. S. 359; *Richmond* v. *Dudley*, 129 Indiana, 112; *Grainger* v. *Douglass Jockey Club*, 148 Fed. Rep. 513.

Prior to the enactment of Chap. 37, cities had no power to declare what should constitute nuisances, or prescribe punishment for their maintenance, nor to bring actions in court for their abatement. *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Cole* v. *Kegler*, 64 Iowa, 59; *Nevada* v. *Hutchins*, 59 Iowa, 506; *Knoxville* v. *C. B. & Q. R. R. Co.*, 83 Iowa, 636; *Chariton* v. *Barber*, 54 Iowa, 306; *City of Ottumwa* v. *Chinn*, 75 Iowa, 407.

If the repealing clause, found in § 3 of the act of the thirty-fifth general assembly, in fact repealed the act of the thirty-fourth general assembly, the only authority

claimed for the offensive ordinance was thereby withdrawn and said ordinance was nullified. *Martin* v. *Oskaloosa*, 99 N. W. Rep. 557; *Pritchard* v. *Savannah Street Ry.*, (Ga.) 14 L. R. A. 712; *St. Louis* v. *Kellman*, 139 S. W. Rep. 433.

As to whether the act of the thirty-fourth general assembly was repealed by the act of the thirty-fifth general assembly see *United States* v. *Musgrave*, 160 Fed. Rep. 700; *United States* v. *Ninety-nine Diamonds*, 139 Fed. Rep. 961; *Kunkalman* v. *Gibson*, (Ind.) 84 N. E. Rep. 985.

As to its construction and the legislative intent, see *Elmer* v. *United States*, 45 Ct. Cl. 90; *Freeman* v. *People*, (Ill.) 89 N. E. Rep. 667; *People* v. *McCullough*, 143 Ill. App. 112; *Rockingham County* v. *Chase*, (N. H.) 71 Atl. Rep. 634; *Hampton* v. *Hickey*, (Ark.) 114 S. W. Rep. 707; *Thorton* v. *State*, 63 S. E. Rep. 301; *Buffalo* v. *Lewis*, (N. Y.) 84 N. E. Rep. 809; *Milligan* v. *Arnold*, (Ind.) 98 N. E. Rep. 822; *Pettiti* v. *State*, 121 Pac. Rep. 278.

As to repeal by reënactment, see *Murphy* v. *Utter*, 186 U. S. 95; *United States* v. *Tynen*, 11 Wall. 88; 36 Cyc. 1077; *Child* v. *Shower*, 18 Iowa, 272; *Allen* v. *Davenport*, 107 Iowa, 90; *Ogden* v. *Witherspoon*, 18 Fed. Cas. No. 19461.

The provisions of the ordinance which are the basis for the prosecutions complained of are in excess of the authority delegated by the acts of the thirty-fourth and thirty-fifth general assemblies in question. *Clark* v. *Davenport*, 14 Iowa, 500; *Tuttle* v. *Church*, 53 Fed. Rep. 425.

The features of the ordinance here involved are void for unreasonableness. *Davis* v. *Anita*, 73 Iowa, 325; *State Center* v. *Barenstien*, 66 Iowa, 249; *Meyers* v. *Chicago R. R. Co.*, 57 Iowa, 555; *Munsell* v. *Carthage*, 105 Ill. App. 119; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Bush* v. *Dubuque*, 69 Iowa, 233; *Centerville* v. *Miller*, 57 Iowa, 56; *St. Louis* v. *Heitzberg Packing Co.*, 141 Missouri, 375.

The second section of the acts of the thirty-fourth and thirty-fifth general assemblies, if construed to delegate authority to enact ordinances containing the provisions in question, are void because repugnant to both the state and Federal Constitutions. *Neola* v. *Reichart*, 131 Iowa, 492; *Iowa City* v. *McInnery*, 114 Iowa, 586; *Bloomfield* v. *Trimble*, 54 Iowa, 399; *Bear* v. *Cedar Rapids*, 141 Iowa, 341; *State* v. *Benke*, 9 Iowa, 203; *Geebrick* v. *State*, 52 Iowa, 401; *State* v. *Weir*, 33 Iowa, 134; *Weir* v. *Cram*, 37 Iowa, 649; *Court* v. *Des Moines*, 80 Iowa, 626; *State* v. *Des Moines*, 108 Iowa, 36; *Dowling* v. *Lancashire Ins. Co.*, (Wis.), 31 L. R. A. 112; *State* v. *King*, 37 Iowa, 649; *Des Moines* v. *Hillis*, 55 Iowa, 643; *Boyd Paving Co.* v. *Ward*, 85 Fed. Rep. 27; *State* v. *Copeland*, 69 N. W. Rep. 27; *State* v. *Tower*, 84 S. W. Rep. 10; *State* v. *Orange*, (N. J.), 36 Atl. Rep. 706.

Mr. Eskil C. Carlson, with whom *Mr. H. W. Byers*, and *Mr. Earl M. Steer*, were on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

The Northwestern Laundry and T. R. Hazard, its president, filed a bill in the District Court of the United States for the Southern District of Iowa, against the City of Des Moines, Iowa; James R. Hanna, Mayor; W. A. Needham, Commissioner; Zell G. Roe, Commissioner; F. T. Van Liew, Commissioner; J. I. Myerly, Commissioner; W. H. Byers, Commerce Counsel; R. O. Brennan, City Solicitor; Eskil C. Carlson, Assistant City Solicitor; Harry McNutt, Smoke Inspector; and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker and Geo. France, Members Smoke Abatement Commission. The purpose of the bill was to enjoin the enforcement of an ordinance of the City of Des Moines, effective September 6, 1911, which provided that the emission of dense smoke in por-

tions of that city should be a public nuisance and prohibited the same. To that end the ordinance authorized the appointment of a Smoke Inspector, and otherwise dealt with the subject with a view to effecting the prohibitive purpose declared. The case was heard upon the bill and a motion practically amounting to a demurrer.

The bill and amended bill are very lengthy. For our purposes, their allegations and the requirements of the ordinance, sufficiently appear in what is said in the discussion and disposition of the case.

The protection of the due process and equal protection clauses of the Fourteenth Amendment is invoked. It is insisted that the ordinance is void because its standard of efficiency requires the remodeling of practically all furnaces which were in existence at the time of its adoption; it forbids remodeling or substituted equipment without a prescribed license; it forbids new construction without such license; it fails to specify approved equipment, and instead delegates, first to the inspector, and second, to the smoke abatement commission, the unregulated discretion to arbitrarily prescribe the requirements in each case, without reference to any other as to the required character of smoke prevention device, thus making the right of complainants and their class to own and operate such furnaces subject to the pleasure of the inspector and commission. It is averred that the ordinance exceeds the authority delegated to the city by the legislature; that it attempts to substitute its own definition of the crime and nuisance committed by the emission of dense smoke for that enacted by the legislature in the act under the pretended authority of which the ordinance is adopted; that it is unreasonable and tyrannical and exceeds the authority delegated for want of uniformity as to the whole city and because the exceptions specified are not natural and just. It is alleged that the ordinance prescribes arbitrary tests of degrees of density, and enables the inspector to present irrebutta-

ble proof of violation; that it provides for unlimited prosecutions and successive fines, constituting excessive punishment in the aggregate, without adequate remedy or relief, and undertakes to deprive the courts of power to determine whether the nuisances have in fact been committed or maintained.

A motion to dismiss the bill covered three grounds: First, that the bill did not state any matter of equity entitling complainants to the relief prayed, nor were the facts, as stated in the bill, sufficient to entitle complainants to any relief against defendants; Second, that the bill showed upon its face that the complainants have a plain, speedy, and adequate remedy at law; and Third, as it appeared on the face of the bill that the complainants were all residents of the State of Iowa, and the relief demanded was against an ordinance of the defendant city, the court was without jurisdiction. The court sustained the motion, and entered a final decree dismissing the bill with prejudice. There was no attempt to make a separate issue on the question of jurisdiction, or to take an appeal upon that question alone to this court. Judicial Code, § 238, of March 3, 1911, c. 231, 36 Stat. 1087, 1157.

The decree was a general one on the merits, and, as the bill charged a violation of the Fourteenth Amendment not so frivolous as to fail to give original jurisdiction, the appeal to this court from the final decree brings the whole case here. *Holder* v. *Aultman*, 169 U. S. 81, 88; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 620; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 91.

We are not furnished with any reference to an Iowa statute giving an adequate remedy at law, and we find none such. We have therefore to deal with the questions, Federal and state made upon the face of the bill.

So far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke in

cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this court are *Reinman* v. *Little Rock*, 237 U. S. 171; *Chicago & Alton R. R.* v. *Tranberger*, 238 U. S. 67; *Hadacheck* v. *Sebastian, Chief of Police*, decided December 20, 1915, *ante*, p. 394.

That such emission of smoke is within the regulatory power of the State, has been often affirmed by state courts. *Harmon* v. *Chicago*, 110 Illinois, 400; *Bowers* v. *Indianapolis*, 169 Indiana, 105; *People* v. *Lewis*, 86 Michigan, 273; *St. Paul* v. *Haugbro*, 93 Minnesota, 59; *State* v. *Tower*, 185 Missouri, 79; *Rochester* v. *Macauley-Fien Milling Co.*, 199 N. Y. 207. And such appears to be the law in Iowa, *McGill* v. *Pintsch Compressing Co.*, 140 Iowa, 429.

It is contended that the ordinance is in excess of the legislative authority conferred by the State of Iowa upon the City of Des Moines. This question does not seem to have been directly passed upon by the Supreme Court of Iowa.

The statute of Iowa enacted April 15th, 1911, before the passage of this ordinance, is as follows:

"An Act declaring the emission of smoke within the corporate limits of certain cities to be a public nuisance, and conferring upon such cities additional powers for the abatement of such nuisances. . . .

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. Declared a nuisance. The emission of dense smoke within the corporate limits of any of the

cities of this state now or hereafter having a population of sixty-five thousand (65,000) inhabitants or over, including cities acting under the commission plan of government is hereby declared to be a public nuisance.

"Section 2. Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance." Laws of Iowa, V. 34, chap. 37, p. 27. Approved April 15, 1911.

The ordinance in question was passed on September 6, 1911, and became effective, as we have said, on that date. The City of Des Moines is within the terms of this act. On March 20, 1913, the legislature passed another law, as follows:

"An Act declaring the emission of smoke within the corporate limits of certain cities, including cities acting under special charter, to be a public nuisance, and conferring upon such cities additional powers for the abatement of such nuisances and repealing chapter thirty-seven of the laws of the thirty-fourth general assembly. . . .

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. Declared a Nuisance. The emission of dense smoke within the corporate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance.

"Section 2. Abatement. Every such city is hereby empowered to provide by ordinance for the abatement of

such nuisance either by fine or imprisonment, or by action in the district court of the county in which such city is located, or by both; such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection, and the abatement and prevention of the smoke nuisance.

"Section 3. Repeal. That chapter thirty-seven (37) of the laws of the thirty-fourth general assembly be and the same is hereby repealed." Laws of Iowa, V. 35, p. 43.

This statute likewise includes the City of Des Moines.

The former statute was repealed by the new one. The effect of this repeal upon the validity of the ordinance is a state question, and as we understand the Iowa decisions, the authority of the ordinance here in question remained unimpaired. The statutory change did not have the effect to annul the ordinance passed under the former identical grant of authority. *Allen* v. *Davenport*, 107 Iowa, 90; *State* v. *Prouty*, 115 Iowa, 657.

It is further contended that conceding the statutory authority the ordinance is in excess of the legislative grant. This question does not seem to have been passed upon specifically in any Iowa case called to our attention. The statute, after declaring the emission of dense smoke within the corporate limits of such cities as Des Moines, to be a nuisance, authorizes the city to provide by ordinance for the abatement of such nuisance by fine or imprisonment or by action in the District Court of the county, or both, such action to be prosecuted in the name of the city; and, furthermore, municipalities are authorized to provide by ordinance all necessary rules and regulations for smoke inspection and the abatement or prevention of the smoke nuisance. The Smoke Inspector must be qualified by training and experience to understand the theory and practice of smoke inspection. He has the benefit of counsel of the Smoke Abatement Commis-

sion, consisting of five members to be appointed by the City Council, at least one of whom must have had experience in the installation and conduct of power and heating plants. From the Smoke Inspector there is an appeal to the Smoke Abatement Commission in case of disagreement over plans for newly constructed plants or reconstruction of old ones. This grant of authority would seem to be sufficient to authorize the passage of an ordinance of a reasonable nature, such as we believe the one now under consideration to be. It delegates authority to carry out details to boards of local commissioners. That such rules and regulations are valid, subject as they are to final consideration in the courts, to determine whether they are reasonably adapted to accomplish the purpose of a statute, has been frequently held. 2 Dillon Munic. Corps. 5th Ed. § 574. We find nothing in the Iowa cases to indicate that the Supreme Court of that State has laid down any different rule upon this question. That the courts of Iowa may be resorted to in case of an abuse of the powers vested in the Inspector and Commission seems to follow from the decision of the Supreme Court of the State in *Hubbell* v. *Higgins*, 138 Iowa, 136.

As to the attack upon the ordinance because of arbitrary classification, this question has been so often discussed that nothing further need be said. The ordinance applies equally to all coming within its terms, and the fact that other businesses might have been included, does not make such arbitrary classification as annuls the lgislation. Nor does it make classification illegal because certain cities are included and others omitted in the statute. *Eckerson* v. *Des Moines*, 137 Iowa, 452.

We think the District Court was right in dismissing the bill upon its merits.

Affirmed.